Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

WALTER H. ANNENBERG, as SOLE TRUSTEE of the TRUST UNDER WILL of MOSES L. ANNENBERG, WALTER H. ANNENBERG and LEONORE ANNENBERG,

Petitioners,

v.

BOARD OF COMMISSIONERS OF THE COUNTY OF MONTGOMERY, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Pennsylvania

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Supreme Court of Pennsylvania deprived Petitioners of the due process of law guaranteed by the Fourteenth Amendment by denying them relief in the form of a refund even though the alternative, retroactive application of the personal property tax, is not possible in this instance?

Whether the Supreme Court of Pennsylvania deprived Petitioners of the due process of law guaranteed by the Fourteenth Amendment by denying them relief in the form of a refund on the theory that the state refund statute did not apply, even though a refund had been held out as the clear and certain post-deprivation remedy available to the Petitioners?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioners are Walter H. Annenberg, individually and as Sole Trustee of the Trust Under Will of Moses L. Annenberg, and Leonore Annenberg.

Respondents are The Board of Commissioners of the County of Montgomery, The Board of Assessment Appeals of the County of Montgomery and the County of Montgomery.

The Commonwealth of Pennsylvania and its Attorney General were original Respondents in these cases but were dismissed by the Pennsylvania Commonwealth Court by Order dated December 23, 1996. The Commonwealth parties subsequently declined the Supreme Court of Pennsylvania's invitation to participate in the proceedings. Because the Petitioners seek no relief against the Commonwealth parties, they have been omitted as Respondents to this Petition.

Respondent Intervenors in the Supreme Court of Pennsylvania were the County Commissioners Association of Pennsylvania and the Boards of County Commissioners of Adams, Chester, Dauphin, Indiana, Lackawanna, Schuylkill, Warren and York Counties.

There are no parent companies or subsidiaries of any party known to Petitioners.

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PETITION FOR WRIT OF CERTIORARI

Walter H. Annenberg, individually and as Sole Trustee of the Trust Under Will of Moses L. Annenberg, and Leonore Annenberg respectfully pray that a writ of certiorari issue to review the June 1, 2000 Judgment of the Supreme Court of Pennsylvania pursuant to which Petitioners were denied immediate refunds of their personal property tax payments, and interest thereon, even though (i) these payments were collected pursuant to an unconstitutional scheme of taxation, (ii) the disparate treatment to which they have been subjected cannot be remedied by retroactive application of the personal property tax and (iii) the issuance of refunds is mandated by state statute.

OPINIONS BELOW

The Opinion and Judgment of the Supreme Court of Pennsylvania issued June 1, 2000, and the dissent thereto, (App. 1-App. 35) are not yet reported in the Atlantic Reporter (Second). They are unofficially reported at *Annenberg, et al. v. The Commonwealth of Pennsylvania, et al.*, 2000 WL 718216. The Opinions and Judgment are reprinted in Appendix A.

The Opinion and Order of the Supreme Court of Pennsylvania issued April 7, 1998 (App. 36-App. 48) are not reported in the Atlantic Reporter (Second). They are unofficially reported at *Annenberg, et al. v. The Commonwealth of Pennsylvania, et al.*, 2000 WL 704980. The Opinion and Order are reprinted in Appendix B.

STATEMENT OF JURISDICTION

The Opinions and Judgment of the Supreme Court of Pennsylvania (App. 1-App. 35) were filed on June 1, 2000, and this petition for writ of certiorari has been filed within ninety days of that date. This Court has jurisdiction to review the Judgment of the Supreme Court of Pennsylvania pursuant to 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES

The relevant provisions of the United States Constitution, U.S. CONST. art. I, § 8, cl. 3, and of the Fourteenth Amendment to the United States Constitution, U.S. CONST. amend. XIV, § 1, are reprinted in Appendix C. (App. 49).

The relevant Commonwealth statutory provisions are 72 P.S. § 4821 and 72 P.S. § 5566b. These provisions are reprinted in Appendix D. (App. 50-App. 58).

STATEMENT OF THE CASE

Background

This case involves a challenge under the Commerce Clause of the United States Constitution, U.S. CONST. art. I, § 8, cl. 3, to Pennsylvania's personal property taxation scheme, the Act of June 17, 1913, P.L. 507, *as amended*, 72 P.S. § 4821, *et seq.* (App. 39-App. 40). Pennsylvania's personal property tax statute (the "PPT") provides, in pertinent part:

> [the personal property tax shall be due on] all shares of stock in any bank, corporation, association, company, or limited partnership, created or formed under the laws of this Commonwealth or of the United States, or of any other state or government, *except* shares of stock in any bank, bank and trust company, national banking association, savings institution, corporation, or limited partnership liable to a tax on its shares or a gross premiums tax, or liable to or relieved from the capital stock or franchise tax for State purposes under the laws of this Commonwealth.

72 P.S. § 4821 (emphasis added) (the quoted portion of the PPT is hereinafter referred to as the "stock clause"). (App. 50-App. 52). By its terms, the stock clause permits Pennsylvania's individual county governments to tax certain classes of intangible personal property, including all shares of stock of foreign corporations owned by a resident individual, but precludes the counties from taxing shares of stock in corporations liable for or relieved from Pennsylvania's capital stock or franchise tax. (*Id.*). Because the capital stock and franchise taxes, 72 P.S. § 7602, are only imposed on corporations incorporated in or doing business within the Commonwealth of Pennsylvania (App. 43-App. 44), the PPT unconstitutionally singles out for taxation resident shareholders of foreign corporations that do not conduct business within Pennsylvania. (App. 25).

How the Federal Question Was Presented

Pennsylvania's PPT is materially indistinguishable from the North Carolina intangibles tax scheme held

unconstitutional by this Court in *Fulton Corp. v. Faulkner*, 516 U.S. 325 (1996). In view of this Court's decision in *Fulton*, on March 27, 1996, Walter H. Annenberg, individually and as Sole Trustee of the Trust Under Will of Moses L. Annenberg, and Leonore Annenberg (collectively "Petitioners"), commenced proceedings in the Commonwealth Court of Pennsylvania by filing Petitions for Review in the Nature of Complaints for Declaratory Relief and Injunctive Relief.[1] (App. 40). Through these actions, the Petitioners, *inter alia*, sought a declaration that the PPT violated the Commerce Clause of the United States Constitution, U.S. CONST. art. I, § 8, cl. 3, and was therefore unconstitutional and void. (*Id.*).

By Order and Opinion dated December 23, 1996, the Commonwealth Court of Pennsylvania ruled that it did not have jurisdiction over these matters because the Commonwealth of Pennsylvania was not, in its view, a proper party to the actions. (App. 41).

By Order dated January 31, 1997, the Supreme Court of Pennsylvania assumed plenary jurisdiction over the Petitioners' actions. 42 Pa. C.S.A. § 726. (*Id.*). Fifteen months later, the Supreme Court of Pennsylvania found that the discrimination against foreign corporations and the preferential treatment afforded corporations incorporated or doing business in Pennsylvania was "plain to

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[1] Petitioners paid personal property taxes to the County of Montgomery, Pennsylvania for the years 1993 through 1995. (*Brief for Petitioners*, November 17, 1998, p. 4, n. 3). On March 28, 1996, Petitioners filed timely applications for refunds for each of these years. 72 P.S. § 5566b. (*Id.*). The County of Montgomery last collected the PPT in 1996.

see." (App. 46). Accordingly, the Supreme Court of Pennsylvania held that the PPT, 72 P.S. § 4821, "beyond peradventure" "facially discriminates against interstate commerce." (*Id.*).

Although the Respondents did not attempt to defend the PPT on the grounds that it was a "compensatory" tax, the Supreme Court of Pennsylvania transferred the Petitioners' actions to the Court of Common Pleas for the County of Montgomery, for a hearing on, *inter alia*, whether 72 P.S. § 4821 was nonetheless constitutional as a "compensatory" tax. (App. 47-App. 48). By subsequent Order dated August 17, 1998, the Supreme Court of Pennsylvania limited the Court of Common Pleas' inquiry to the following issues: (i) the evidence regarding the compensatory tax question; (ii) legal arguments on whether the personal property tax is a compensatory tax; and (iii) legal arguments as to whether it is the exemption from the PPT of shares of stock subject to the capital stock and franchise taxes that is unconstitutional, as opposed to the entire tax.

The Court of Common Pleas

The President Judge of the Court of Common Pleas for Montgomery County, Pennsylvania, conducted hearings in September 1998 on the above-enumerated "compensatory" tax issues.[2] Following these hearings,

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[2] Because these cases represented a frontal attack on Pennsylvania's personal property tax scheme, the Commonwealth of Pennsylvania was invited to participate in these hearings notwithstanding its earlier dismissal from the

the Court of Common Pleas issued a report and recommendation in which it opined that Pennsylvania's PPT was not a "compensatory" tax. (*Interim Report*, October 7, 1998, p. 22). The President Judge further stated that, in his view, it was the exclusion of stock in corporations subject to the capital stock or franchise taxes which was unconstitutional, not the entire PPT or even the stock clause. (App. 6).

Next, the President Judge recommended that the exclusion be severed from the PPT, leaving counties the authority to levy a PPT, up to four mills, on all corporate stock owned by Pennsylvania residents not otherwise exempted or excluded. (*Id.*). The President Judge posited that counties had planned their financial affairs based on the assumption that shares in foreign corporations were taxable. (*Interim Report*, October 7, 1998, p. 26). These expectations caused the Court of Common Pleas to recommend that any modification to the PPT should be implemented prospectively only and that the County of Montgomery should be permitted to retain the personal property taxes theretofore collected. (App. 23). The President Judge submitted his report and recommendation to the Supreme Court of Pennsylvania on October 7, 1998. (App. 6).

The Supreme Court of Pennsylvania

Following review of the lower court's Report and Recommendation and the submissions of the parties, by

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cases. The Commonwealth of Pennsylvania refused this invitation. (*Interim Report*, October 7, 1998, p. 2).

Opinion and Judgment dated June 1, 2000, the Supreme Court of Pennsylvania concluded that the stock clause of the PPT, 72 P.S. § 4821, was not "compensatory." (App. 15). Although it had now ruled that the stock clause was both (1) facially discriminatory (App. 4) and (2) not "compensatory" (App. 15), the Supreme Court of Pennsylvania accepted the lower court's recommendation that only the exclusion to the stock clause should be found to be unconstitutional. (App. 15-App. 16). Parsing the stock clause in this way permitted five of the seven justices of the Supreme Court of Pennsylvania to opine that the taxing authority had been "legally entitled" to collect personal property taxes from the Petitioners because these taxes were paid pursuant to a part of the stock clause which was not unconstitutional. (App. 29-App. 30). The majority of the Supreme Court of Pennsylvania thus rejected the Petitioners' argument that the Commonwealth's refund statute, May 21, 1943, P.L. 349, *as amended*, 72 P.S. § 5566b, required the issuance of refunds in this instance. (App. 28-App. 31).

Notwithstanding the view that the Petitioners paid personal property taxes pursuant to a portion of the stock clause which it deemed constitutional, the Supreme Court of Pennsylvania acknowledged that under this Court's decision in *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, Fla. Dept. of Business Regulation*, 496 U.S. 18 (1990) "some retroactive remedy is due here so that the prior unconstitutional discrimination is rectified." (App. 25). The majority failed to consider – much less address – the fact that, putting aside the refund statute, refunds nonetheless must issue in this instance because retroactive application of the PPT would be constitutionally impermissible. (*Brief for Petitioners*, November 17, 1998,

pp. 31-32, *Reply Brief for Petitioners,* December 31, 1998, pp. 17-18). Instead, these matters were remanded to the County of Montgomery for that taxing authority to choose how to remedy "forthwith" the discriminatory impact of the personal property tax within the limitations described by this Court in *McKesson*. (App. 31).

Finding the majority's opinion both internally inconsistent and motivated by a desire to avoid the "apparently unpalatable conclusion" that refunds must issue to these Petitioners under 72 P.S. § 5566b, two justices of the Supreme Court of Pennsylvania dissented as to that portion of the June 1, 2000 Opinion and Judgment which denied the Petitioners immediate refunds. (App. 31-App. 34).

As of the date of this Petition, the taxing authority has failed and refused to remedy the prior unconstitutional treatment suffered by the Petitioners.

REASONS FOR GRANTING THE PETITION

The Supreme Court of Pennsylvania's remand of Petitioners' claims to the County of Montgomery for that taxing authority to choose how to remedy the unconstitutional discrimination against the Petitioners was improper because the only constitutionally permissible remedy is a refund.

The Supreme Court of Pennsylvania's decision not to allow Petitioners a remedy under the Commonwealth refund statute is also in direct conflict with this Court's decisions in *Newsweek, Inc. v. Fla. Dept. of Revenue, et al.,*

522 U.S. 442 (1998), *Fulton* and *Reich v. Collins*, 513 U.S. 106 (1994).

A. THE SUPREME COURT OF PENNSYLVANIA'S RULING VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

As this Court made clear in *McKesson*, the Due Process Clause of the Federal Constitution's Fourteenth Amendment requires that a taxpayer who challenges the validity of a state tax under the Constitution be given a clear and certain remedy for any erroneous or unlawful tax collection to insure that the opportunity to contest the tax is a meaningful one by preventing any permanent unlawful deprivation of property. *McKesson*, 496 U.S. 18, 40 (1990). While a state found to have imposed an impermissibly discriminatory tax ordinarily retains flexibility in responding to such a determination, the resultant tax actually assessed for the contested period must still "reflec[t] a scheme that does not discriminate against interstate commerce", *id.*, 496 U.S. at 40-41, and the approach chosen must be consistent with other constitutional provisions, most notably due process. *Fulton*, 516 U.S. at 346; *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 100-102 (1993); *McKesson*, 496 U.S. at 39-41.

Based on its understanding of this Court's decision in *McKesson*, the Supreme Court of Pennsylvania remanded the Petitioners' claims to the County of Montgomery for the taxing authority to "forthwith provide a retrospective remedy consistent with this opinion." (App. 31). However, by remanding these cases rather than directing the

payment of refunds, the Supreme Court of Pennsylvania is simply perpetuating the due process violations to which Petitioners have heretofore been subjected.

Specifically, although *McKesson* stands for the general proposition that the taxing authority retains some "flexibility" in crafting the appropriate "meaningful backward-looking" relief, refund is the only remedy which will actually reflect a taxation scheme that does not discriminate against interstate commerce here and, therefore, the only remedy which could comport with the Due Process Clause of the Fourteenth Amendment.

In this instance, the taxing authority is precluded from retroactively imposing the personal property tax in order to impose equal burdens on the tax's former beneficiaries. Under the Supreme Court of Pennsylvania's decision in *Commonwealth v. Budd Co.*, 108 A.2d 563 (Pa. 1954), *appeal dismissed*, 349 U.S. 935 (1955), a change in the subject matter of taxation under a prior act may not be retroactively applied beyond the general legislative session immediately preceding the enacted change in the taxation scheme. 108 A.2d at 569. The general legislative session immediately preceding the Supreme Court of Pennsylvania's June 1, 2000 decision, the 184th Regular Session of the General Assembly, began on January 4, 2000. Applying the personal property tax retroactively to January 4, 2000 will not, in any respect, "create in hindsight a nondiscriminatory scheme", for the contested years of 1993, 1994 and 1995. *McKesson*, 496 U.S. at 40. The Supreme Court of Pennsylvania simply ignored the argument presented in Petitioners' submissions that due process cannot be satisfied by such a meaningless retroactive assessment, thereby perpetuating the discrimination

against the Petitioners and others similarly situated.[3] (*Brief for Petitioners*, November 17, 1998, pp. 31-32; *Reply Brief for Petitioners*, December 31, 1998, pp. 17-18).

The Supreme Court of Pennsylvania also failed to address Petitioners' argument that, assuming *arguendo* meaningful retroactive application of the personal property tax were a viable option, the state statute of limitations as well as the passage of time and transience of taxpayers make it impossible for the County of Montgomery to achieve substantial uniformity of taxation with respect to residents who would now be liable for personal property taxes for the years 1993, 1994 and 1995.[4] (*Brief for Petitioners*, November 17, 1998, p. 32). *See In re Davis*, 37 A.2d 498, 499 (Pa. 1944) (unless the returns filed were either false or incomplete, no authority existed whereby the Board could make a reassessment for prior years); *Schmuck v. Hartman*, 70 A. 1091, 1092 (Pa. 1908) (absent specific statutory authority, no retroactive assessment of personal property tax may be made after the year for which the tax would have been due). Absent substantial uniformity, the taxing authority would run afoul of the

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[3] Petitioners' challenge was the first of many lodged across the Commonwealth to Pennsylvania's PPT. *See, e.g., Israelit v. Montgomery County*, 703 A.2d 722 (Pa. Cmwlth. 1997); *PNC Bank N.A. v. Montgomery County*, Court of Common Pleas, Montgomery County, No. 96-11448 (June 20, 1996). These subsequent challenges were held in abeyance pending disposition of these cases.

[4] While the retroactive assessment need not be perfectly successful, the number of "favored" taxpayers who will not be retroactively assessed dooms any effort to achieve "adequate relief" by this means. *McKesson*, 496 U.S. at 40, n. 23.

uniformity of taxation requirements of the Pennsylvania Constitution, Article VIII, § 1. Moreover, the imposition of this tax burden back to 1993 may also be "so harsh and oppressive as to transgress the constitutional limitation" on retroactive assessment. *McKesson*, 496 U.S. at 40, n. 23. (citations omitted).

Because due process can only be satisfied through the issuance of refunds, the Supreme Court of Pennsylvania was obliged to remand this case with instructions to issue refunds to Petitioners for the years 1993, 1994 and 1995. The Supreme Court of Pennsylvania's handling of these cases contravenes the Petitioners' unassailable constitutional rights as defined by this Court.

B. THE COURT'S REFUSAL TO ENFORCE THE STATE REFUND STATUTE CONSTITUTES A DENIAL OF PETITIONERS' DUE PROCESS RIGHTS

The Supreme Court of Pennsylvania's Judgment also fails to credit this Court's post-*McKesson* decisions addressing meaningful backward-looking relief: *Reich v. Collins*, 513 U.S. 106 (1994) and *Newsweek, Inc. v. Fla. Dept. of Revenue, et al.*, 522 U.S. 442 (1998). Specifically, following its 1990 decision in *McKesson*, this Court has had the opportunity, on two occasions, to make clear that where a state has held out a clear and certain post-deprivation remedy – and that remedy is a refund – that form of meaningful backward-looking relief may not be taken away from the taxpayer "in *midcourse*." *See Reich*, 513 U.S. at 111: "what a State may *not* do, . . . is to reconfigure its scheme, unfairly, in *midcourse* – to 'bait and switch,' as

some have described it." (emphasis added). *See also Newsweek*, 522 U.S. at 444: "a State may not 'bait and switch' by 'holding out what plainly appears to be a "clear and certain" postdeprivation remedy and then declare, only after the disputed taxes have been paid, that no such remedy exists'." (citation omitted).

Pennsylvania has just such a clear and certain postdeprivation refund statute. Section 5566b of Pennsylvania's Local Tax Collection Law, 72 P.S. § 5566b, provides as follows:

> (a) [w]henever any person . . . of this Commonwealth has paid or caused to be paid, . . . into the treasury of any political subdivision, . . . any taxes of any sort, . . . to which the political subdivision is not legally entitled; then, in such cases, the proper authorities of the political subdivision, upon the filing with them of a written and verified claim for the refund of the payment, are hereby directed to make, . . . refund of such taxes . . . to which the political subdivision is not legally entitled.
>
> * * *
>
> (b) [t]he right to a refund afforded by this act may not be resorted to in any case in which the taxpayer involved had or has available under any other statute, ordinance or resolution, a specific remedy by way of review, appeal, refund, or otherwise, for recovery of moneys paid as aforesaid, *unless* the claim for refund is for the recovery of moneys paid under a provision of a statute, . . . subsequently held, by final judgment of a court of competent jurisdiction,

> to be *unconstitutional*, or under an interpretation of such provision subsequently held by such court, to be erroneous. (App. 57).

72 P.S. § 5566b (emphasis added). In reliance on the above refund provisions, the day after their Petitions were filed in the Commonwealth Court of Pennsylvania, Petitioners filed timely applications for refunds for 1993, 1994 and 1995. (*Brief for Petitioners*, November 17, 1998, p. 4, n. 3). Because a court of competent jurisdiction has now found that the taxation scheme reflected in the stock clause is unconstitutional and, accordingly, that Petitioners have been unlawfully discriminated against, the Local Tax Collection Law requires the taxing authority to refund taxes paid pursuant to that clause, with interest. 72 P.S. § 5566b.

Facing this "apparently unpalatable conclusion" (App. 33-App. 34), a majority of the Supreme Court of Pennsylvania contrived an interpretation of the stock clause which, it claimed, would support the conclusion that the state refund statute did not apply in this case. Despite indisputable findings that the stock clause was both (1) facially discriminatory and (2) not compensatory, the Supreme Court of Pennsylvania found that it was the exclusion imbedded in the stock clause which caused the stock clause provision to run afoul of the Commerce Clause, and, therefore, that only that portion of the stock clause was unconstitutional. (App. 15-App. 16). This conclusion formed the basis for the majority's ruling that the state refund statute did not apply because, under that enactment, taxing authorities are only required to refund taxes to which they are not "legally entitled." 72 P.S. § 5566b. (App. 28-App. 30).

The conclusion reached by the Supreme Court of Pennsylvania is fundamentally inconsistent with this Court's determination in *Fulton* that "[o]ur finding that North Carolina has failed to show that its intangibles tax satisfies any of the three requirements for a valid compensatory tax ***leaves the tax unconstitutional*** as facially discriminatory under our modern tests." 516 U.S. at 344 (emphasis added). *See also Fulton*, 516 U.S. at 346 ("North Carolina's intangibles tax facially discriminates against interstate commerce, it fails justification as a valid compensatory tax, and, accordingly, ***it cannot stand.***" (emphasis added)).

The position espoused by the Supreme Court of Pennsylvania is deliberately obtuse. Irrespective of which portion of the stock clause renders the clause discriminatory against interstate commerce, it is the entire clause – and the taxation scheme reflected therein – that resulted in the disparate, and therefore unlawful, treatment of Petitioners. To the extent taxing authorities collected taxes in accordance with this taxation scheme they did so unconstitutionally.

It is equally clear that "a tax which was unconstitutionally collected is without question one to which the governmental entity was 'not legally entitled.' Thus, . . . the only remedy available in the matters *sub judice* is the one mandated by 72 P.S. § 5566b: a refund." (App. 33). The Supreme Court of Pennsylvania's proper conclusion that the Petitioners' "unconstitutional deprivation" and "prior unconstitutional discrimination" must be remedied through "meaningful backward-looking" relief, (App. 23, App. 25), also undercuts its distorted

view that the taxing authority was legally entitled to collect these taxes.

The notion that an unconstitutional tax was still legally collected also ignores the refund statute itself and the obvious interdependence of paragraph (a) relating to taxes to which a taxing authority is legally entitled and (b) which enumerates when a taxing authority is "not legally entitled" to tax monies: when a taxing provision is held to be unconstitutional or erroneous. (App. 57). The Supreme Court of Pennsylvania was bound to give effect to both of these provisions when considering the applicability of the refund provisions. 1 Pa. C.S.A. § 1921. Its failure to afford Petitioners the relief to which they are statutorily entitled in light of a "plain to see" violation of the Commerce Clause is a clear violation of Petitioners' due process rights under the Fourteenth Amendment.

CONCLUSION

For all of the foregoing reasons, Petitioners Walter H. Annenberg, individually and as Sole Trustee of the Trust Under Will of Moses L. Annenberg, and Leonore Annenberg respectfully submit that their petition for writ of certiorari should be granted.

Respectfully submitted,

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DATED: August 30, 2000

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APPENDIX A

[J-109-1997]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

WALTER H. AND LEONORE ANNENBERG,	:	No. 003 M.D. Miscellaneous Docket 1997
Petitioners	:	Exercise of Plenary Jurisdiction
v.	:	
COMMONWEALTH OF PENNSYLVANIA and D. MICHAEL FISHER, ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA and BOARD OF COMMISSIONERS OF THE COUNTY OF MONTGOMERY, being RICHARD BUCKMAN, JOSEPH HOEFFEL and MARIO MELE (solely in their official capacities) and BOARD OF ASSESSMENT APPEALS OF THE COUNTY OF MONTGOMERY and COUNTY OF MONTGOMERY,	:	
Respondents	:	

INTERVENORS: COUNTY COMMISSIONERS' ASSOCIATION OF PENNSYLVANIA and THE BOARDS OF COUNTY COMMISSIONERS OF ADAMS, CHESTER, DAUPHIN, INDIANA, LACKAWANNA, SCHUYLKILL, WARREN and YORK COUNTIES[1]	
----------	No. 004 M.D. Miscellaneous Docket 1997
WALTER H. ANNENBERG, as Sole Trustee of the Trust Under the Will of Moses L. Annenberg, Petitioner v. COMMONWEALTH OF PENNSYLVANIA and D. MICHAEL FISHER, ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA and BOARD OF	Exercise of Plenary Jurisdiction RESUBMITTED: December 28, 1999

[1] These parties were granted intervenor status in this matter pursuant to a *per curiam* order of this Court, dated June 26, 1998. They shall be referred to hereafter as the Intervenor Counties.

COMMISSIONERS OF THE COUNTY OF MONTGOMERY, being RICHARD BUCKMAN, JOSEPH HOEFFEL and MARIO MELE (solely in their official capacities) and BOARD OF ASSESSMENT APPEALS OF THE COUNTY OF MONTGOMERY and COUNTY OF MONTGOMERY,	:
Respondents	:
INTERVENORS: COUNTY COMMISSIONERS' ASSOCIATION OF PENNSYLVANIA and THE BOARDS OF COUNTY COMMISSIONERS OF ADAMS, CHESTER, DAUPHIN, INDIANA, LACKAWANNA, SCHUYLKILL, WARREN and YORK COUNTIES	:

OPINION

MR. JUSTICE ZAPPALA **DECIDED: JUNE 1, 2000**

We exercised plenary jurisdiction[2] over these matters to determine whether Section 4821 of the Act of June 17,

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[2] 42 Pa.C.S. § 726.

1913, P.L. 507, *as amended*, 72 P.S. §§ 4821-4902, is unconstitutional as it violates the Commerce Clause of the United States Constitution.[3] On April 7, 1998, we issued an opinion and order holding that the stock clause of the personal property tax (stock clause), 72 P.S. § 4821, facially discriminated against interstate commerce. *Annenberg v. Commonwealth*, ___ A.2d ___ (Pa. 1998) (*Annenberg I*). We remanded the matter to the Court of Common Pleas of Montgomery County for a hearing to be held and an interim report to be issued on whether the stock clause was a "compensatory tax." Following a hearing, an Interim Report was issued by President Judge Joseph A. Smyth of Montgomery County. After reviewing this Interim Report, the record and the filings by all parties, we conclude that the portion of the stock clause which excludes from the personal property tax stock held in companies which are subject to the capital stock and franchise taxes is unconstitutional.

As detailed in our opinion in *Annenberg I*, Walter H. Annenberg, as the Sole Trustee for the Trust under the Will of Moses L. Annenberg, and Walter H. and Leonore Annenberg, filed petitions for review in the Commonwealth Court seeking a declaration that the stock clause of the personal property tax[4] violates the Commerce

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[3] U.S. Const. art. I, § 8, cl. 3

[4] The statute which imposes the personal property tax consists of over 2,400 words, contained in three sentences, comprising two paragraphs. 72 P.S. § 4821. While the personal property tax applies to several classes of property, we are here concerned with its application to only one class of property: stock. The statute states in pertinent part that

> [the personal property tax shall be due on] all shares

Clause of the United States Constitution and is therefore null and void insofar as it imposes a tax on any corporate stock held by them. The Commonwealth Court declined to exercise jurisdiction over this matter. Subsequently, the Annenbergs filed a petition with this Court, asking that we exercise plenary jurisdiction over this matter. We granted the Annenbergs' petition.

On April 7, 1998, we issued our *Annenberg I* opinion. We reasoned that the United States Supreme Court's recent ruling in *Fulton Corp. v. Faulkner*, 516 U.S. 325

> of stock in any bank, corporation, association, company or limited partnership, created or formed under the laws of this Commonwealth or of the United States, or of any other state or government, except shares of stock in any bank, bank and trust company, national banking association, savings institution, corporation, or limited partnership liable to a tax on its shares or a gross premiums tax, *or liable to or relieved from the capital stock or franchise tax for State purposes under the laws of this Commonwealth*. . . .

72 P.S. § 4821 (emphasis supplied).

The portion of the stock clause tax which the Annenbergs attacked as being unconstitutional is underscored above. That phrase excludes from the personal property tax stock held in entities to which the capital stock and franchise tax apply. The capital stock tax applies to companies organized under the laws of this Commonwealth, 72 P.S. § 7602(a). The franchise tax, on the other hand, is owed by entities which are organized in any jurisdiction other than this Commonwealth which also do business in and are liable to taxation in this Commonwealth. 72 P.S. §§ 7602(b) and 7601. Thus, the net effect of the stock clause is that "the only stock on which an owner is liable to pay tax pursuant to the stock clause is on stock in foreign corporations which do not do business in Pennsylvania." *Annenberg I*, ___ A.2d at ___.

(1996), compelled a finding that the stock clause facially discriminated against interstate commerce. However, we did not declare that the stock clause was unconstitutional at that point. Rather, we noted that a tax provision which is facially discriminatory may nonetheless avoid being declared null and void where the government is able to overcome the presumption of invalidity "by showing that the statute is a 'compensatory tax' designed simply to make interstate commerce bear a burden already borne by intrastate commerce." *Annenberg I*, A.2d at ___ (citing *Fulton*). As the inquiry into whether the stock clause is a compensatory tax is largely factual in nature, we directed the Court of Common Pleas of Montgomery County to conduct a hearing on the compensatory tax issue and retained jurisdiction.

President Judge Joseph A. Smyth conducted hearings in which the Annenbergs, the County of Montgomery and the Intervenor-Counties (collectively the Counties) participated. After the close of hearings, President Judge Smyth filed his Interim Report with this Court on October 7, 1998. President Judge Smyth found that the Counties had not met their burden of proving that the stock clause is a compensatory tax and thus concluded that the exclusionary language in the stock clause was unconstitutional. Interim Report at 22. However, President Judge Smyth reasoned that the statute need not be struck down in its entirety. Rather, he posited that the language of the statute which excluded from taxation stock subject to the capital stock or franchise tax could be severed from 72 P.S. § 4821, leaving a personal property tax which applied to all classes of stock, whether they be held in out-of-state or in-state corporations. Interim Report at 25. Finally,

President Judge Smyth declared that the Counties should be able to keep the tax which had been previously collected under the stock clause. Interim Report at 26. In arriving at this conclusion, President Judge Smyth stated that once the unconstitutional exclusion was severed from the stock clause, leaving a tax which was applicable to stock held in either out-of-state or in-state entities, then a valid tax remained; President Judge Smyth reasoned that in that event, the "[C]ounties should be permitted to retain and collect the personal property tax on stock that is not subject to the capital stock or franchise taxes." Interim Report at 26.

In determining our proper scope and standard of review of the Interim Report, we are presented with a seemingly unique procedural situation: we exercised plenary jurisdiction over these matters; we subsequently directed that another tribunal essentially act as a special master and hold hearings and issue a report, but did not relinquish our jurisdiction to that other tribunal. At this juncture, we are now reviewing the Interim Report containing the proposed findings of fact and conclusions of law.[5] We find that in matters such as these where we have

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[5] We recognize that the matter of *Masloff v. Port Authority of Allegheny County*, 613 A.2d 1186 (Pa. 1992), wherein this Court stated that it would employ a variant of the abuse of discretion standard in reviewing the findings of the "chancellor" below, shares some common procedural elements with the matter *sub judice*. In *Masloff*, we exercised plenary jurisdiction over the matter prior to any action being taken by a lower court. We then remanded the matter to the Commonwealth Court to hold hearings. Up until this point, *Masloff* is strikingly similar to the matter at hand. In *Masloff*, the Commonwealth Court sitting in equity had the power to enter a permanent injunction – a power

exercised plenary jurisdiction and have not relinquished that jurisdiction to the tribunal which is in essence acting as a special master for this Court, our review must be *de novo*. We note, however, that when addressing the findings of fact made by President Judge Smyth, although such findings are not binding on us, we will afford them due consideration, as the jurist who presided over the hearings was in the best position to determine the facts. *Cf. Zimmerman v. Zimmerman*, 236 A.2d 785 (Pa. 1968) (in a divorce proceeding, the findings of a master, although not binding on the court, are entitled to due consideration as the master had the opportunity to hear and to observe the witnesses and was thus in a better position to pass upon the credibility of such witnesses); *see also Snyder v. Snyder*, 620 A.2d 1133 (Pa. 1993).

We now turn to the substantive issue of whether the stock clause is a compensatory tax. Where a taxation statute has been determined to facially discriminate against interstate commerce, a state may overcome the presumption of invalidity by showing that the statute is a " 'compensatory tax' designed simply to make interstate commerce bear a burden already borne by intrastate commerce." *Fulton*, 516 U.S. at 331 (citations omitted). It must be shown that the tax "advances a legitimate local purpose that cannot be adequately served by reasonably

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which it exercised. In this matter, however, President Judge Smyth had no power to issue such an order as we retained jurisdiction. Thus, President Judge Smyth necessarily had no discretion which he could exercise. Thus, we do not find that it would be appropriate to apply the *Masloff* standard here as *Masloff* is distinct in a crucial way.

nondiscriminatory alternatives." *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 278 (1988). In a truly compensatory tax scheme, "the stranger from afar is subject to no greater burdens as a consequence of ownership than the dweller within the gates. The one pays upon one activity or incident, and the other upon another, but the sum is the same when the reckoning is closed." *Oregon Waste Systems, Inc. v. Department of Environmental Quality of Oregon*, 511 U.S. 93, 103 (1994) (citing *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937)). The state bears an extraordinarily heavy burden in making this showing. *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979).

For a tax to be considered a valid compensatory tax, it is incumbent upon the governmental entity to establish three things. First, as a threshold matter, the government must identify the intrastate tax burden for which the facially discriminatory tax is compensating. *Fulton*, 516 U.S. at 332. This prong cannot be met unless the government establishes that the tax on interstate commerce "is fairly related to the services provided by the State [which benefit interstate commerce]." *Id.* at 334 (citations omitted). Second, the "tax on interstate commerce must be shown roughly to approximate – but not exceed – the amount of the tax on intrastate commerce." *Id.* at 332-33 (citations and internal quotation marks omitted). Finally, the government must show that "the events on which the interstate and intrastate taxes are imposed must be 'substantially equivalent'; that is, they must be sufficiently similar in substance to serve as mutually exclusive 'prox[ies] for each other.' " *Id.* at 333 (citations omitted). The three prong *Fulton* test is stated in the conjunctive; thus, failure to meet one of any of the three prongs results

in a finding that the governmental entity has failed to meet its burden in establishing that the discriminatory tax is nonetheless valid as a compensatory tax.

As to the first prong of the *Fulton* compensatory tax test, the Counties argue that the legislature crafted the stock clause as part of a comprehensive taxing scheme in order to compensate for the taxes exacted by the capital stock and franchise taxes. We must reject this argument for two reasons.

First, we find that the Counties' argument that the personal property tax, including the stock clause, was part of a comprehensive taxing scheme created by the legislature is belied by the history of the enactment of these taxes. The first personal property tax was enacted in 1831. This tax reached all stock held by Pennsylvania residents and the revenues from this tax went to the Commonwealth's, rather than the Counties', coffers. Act of March 25, 1831, P.L. 206.

The first capital stock tax was not enacted until 1840. Act of June 11, 1840, P.L. 612. This capital stock tax applied only to Pennsylvania corporations. In 1868, the legislature expanded the capital stock tax to reach foreign corporations doing business in Pennsylvania. Act of May 1, 1868, P.L. 108. The legislature amended the personal property tax law by excluding any stock held in corporations which were liable for the capital stock tax. Act of June 1, 1889, P.L. 420. A further amendment to the personal property tax took place in 1913 when the personal property tax became a county tax.

In 1935, the legislature amended the capital stock tax so that the stock held in foreign corporations doing business in Pennsylvania would be taxed under the franchise tax, and not the capital stock tax. Act of May 16, 1935, P.L. 184. In 1939, the legislature amended the personal property tax to make clear that stock in companies liable to the franchise tax were also exempt from the personal property tax. Act of June 19, 1939, P.L. 413.[6]

Finally, in 1978, the legislature amended the personal property tax, allowing the counties the option of levying what had previously been a mandatory tax. 72 P.S. § 4821.1. Since that time, many counties have opted to cease collecting the personal property tax; at present, only a third of the counties collect this tax. Interim Report at ¶¶ 43 and 44.

Upon review, we agree with President Judge Smyth that these taxes were not an integrated, comprehensive system of taxation. President Judge Smyth concluded that history shows that these taxes "developed independent of each other throughout their histories . . . [and that] [a]t no time was there a correlation between the taxes." Interim Report at ¶ 37. The evidence does not support the contention that the legislature enacted these taxes as part of an interconnected scheme; we thus adopt President Judge Smyth's finding on this point.

Our second reason for rejecting the Counties' argument is that they have not established that the stock

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[6] The 1939 amendment was essentially a codification of this Court's decision in *In re Arrott's Estate*, 322 Pa. 367, 185 A. 697 (1936).

clause tax "is fairly related to the services provided by the State [which benefit interstate commerce]." *Fulton*, 516 U.S. at 334. Some of the Counties attempted to show that they provided services which benefited interstate commerce by showing that they provided services which corporations not doing business in Pennsylvania arguably utilized. *See* Interim Report at ¶¶ 7, 12 and 17. However, none of the Counties established to what extent these services were provided to or utilized by corporations not doing business in Pennsylvania. Thus, we are unable to determine whether the tax imposed by the stock clause "is fairly related to the services" provided by the Counties.

Even if, however, we were to find that the Counties met their burden as to the first prong of the compensatory tax test, we would still find that their claim failed as they have not met the second prong. The second prong of the compensatory tax test requires that the Counties establish that the tax imposed by the facially discriminatory stock clause roughly approximates, but does not exceed, the amount of the tax burden which the capital stock tax and the franchise tax impose. *Fulton*, 516 U.S. at 332-33.

To meet this burden, the Counties presented the testimony of an expert witness whose background was in economics and public policy. The expert witness testified that in the years 1992-1996, the capital stock and franchise taxes were collected at a rate of 12.75 mills. Of that, 12 mills went into a general fund which was distributed on a state-wide basis, while the remaining .75 mills were specifically allocated to the Lottery Fund and the Hazardous Sites Cleanup Fund.

In 1992, approximately 40.1% of that general fund was distributed to local governments.[7] The expert witness postulated that 40.1% of the capital stock and franchise taxes should thus be viewed as going to local governments. The witness further calculated that approximately 4.8 mills (or 40.1% of 12 mills) of the capital stock and franchise taxes went to local governments in 1992. He then compared that 4.8 mills figure to the 4 mills rate levied by the personal property tax and concluded that the personal property tax roughly approximates, but does not exceed, the amount of the tax burden which the capital stock tax and the franchise tax impose.

We are not persuaded by the expert witness's testimony. First, the witness did not take cognizance of the fact that the money distributed from the general fund to local governments is distributed not only to counties, which may collect the personal property tax, but also to municipalities, townships and school districts, which in general may not collect the personal property tax.[8] It is unclear which portion of the 4.8 mills figure was distributed to the Counties and thus could possibly be seen as a counterpart to the allegedly compensatory personal property tax, and which portion was distributed to local entities which cannot collect the personal property tax and

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[7] The percentage of the general fund which went to local governments remained fairly constant throughout the period in question.

[8] Apparently, the Pittsburgh School District and the Philadelphia School District at one point collected a personal property tax. N.T., 9/15/98 (morning session) at 68.

thus could in no fashion be seen as a counterpart to the personal property tax.

Second, the witness's figures concerning distributions from the general fund included distributions made to every county in this Commonwealth. This is highly problematic for, as noted, not all counties collect the personal property tax. In order to give an accurate representation of whether the taxes collected by the personal property tax are in parity with the portion of the capital stock and franchise taxes the counties receive from the general fund, the witness would have had to calculate how much the counties which collect the personal property tax receive from the general fund, and exclude from his calculations how much the general fund distributes to the counties which do not collect the personal property tax.

Finally, even assuming *arguendo* that the Counties had met the first two of the three prongs, we would nonetheless conclude that they had failed to establish that the stock clause of the personal property tax is a compensatory tax as they have not carried their burden as to the third prong. The third prong of the compensatory tax doctrine requires that "the events on which the interstate and intrastate taxes are imposed must be 'substantially equivalent'; that is, they must be sufficiently similar in substance to serve as mutually exclusive 'prox[ies] for each other.' " *Fulton*, 516 U.S. at 333.

In analyzing this third prong, President Judge Smyth credited the opinion of the Annenbergs' expert witness that the personal property tax is not substantially equivalent to the capital stock and franchise taxes. *See* Interim

Report at ¶ 43. In arriving at this conclusion, the witness testified that the personal property tax is based on the value of shares on one day, while the capital stock and franchise taxes are determined by measuring economic flow. Also, the witness noted that the taxes are imposed and utilized by different levels of government. The personal property tax is imposed at the county level and is utilized for county purposes. The capital stock and franchise taxes, on the other hand, are imposed at the state level and are utilized for state purposes.[9] Thus, President Judge Smyth concluded that the Counties had failed to meet the third prong of the compensatory tax test. We agree with President Judge Smyth on this point and adopt his reasoning.

The Counties have failed to carry their burden of establishing that the stock clause of the personal property tax is a compensatory tax. We are thus compelled to find that the portion of the stock clause which excludes from

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[9] As additional support for his conclusion, the witness stated that the incidence of the tax does not fall on the same class of taxpayers. With the personal property tax, it is the shareholder who pays the tax; with the capital stock and franchise taxes, it is the corporation itself which pays the tax. The Counties contest this conclusion, however, arguing that this Court in *In re Arrott's Estate*, held that there is a "unity of interest" between a stockholder and the corporation such that a tax paid by the corporation is seen as being paid by the stockholder. Thus, the Counties conclude that these three taxes do fall on the same class of taxpayer.

Even if we were to assume *arguendo* that the Counties' interpretation of *In re Arrott's Estate* is correct, the taxes are still dissimilar enough in nature so that the third prong of the *Fulton* analysis cannot be met.

the personal property tax stock held in companies which are subject to the capital stock and franchise taxes is unconstitutional as it violates the Commerce Clause of the United States Constitution.

The next step in our analysis is to determine whether the exclusionary language in the stock clause, the language which renders the stock clause unconstitutional, may be severed. In analyzing this issue, we are keenly aware of the precept that the "public policy of this Commonwealth favors severability." *Commonwealth, Department of Education v. The First School*, 370 A.2d 702, 705 (Pa. 1977).

This Commonwealth's principles of statutory construction declare that

> [t]he provisions of every statute shall be severable. If any provision of any statute . . . is held invalid, the remainder of the statute . . . shall not be affected thereby, unless the court finds that the valid provisions of the statute are so essentially and inseparably connected with, and so depend upon, the void provision or application, that it cannot be presumed the General Assembly would have enacted the remaining valid provisions without the void one; or unless the court finds that the remaining valid provisions, standing alone, are incomplete and incapable of being executed in accordance with the legislative intent.

1 Pa.C.S. § 1925.[10]

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[10] In general, provisions of the Statutory Construction Act, 1 Pa.C.S. § 1501 *et seq.*, cannot be applied to statutes enacted

In addressing this issue, President Judge Smyth determined that the unconstitutional portion of the statute, which excluded from the tax stock held in companies which were subject to the capital stock and franchise taxes, could indeed be severed. The Annenbergs, however, contest this, arguing in essence that the passage of time has altered the severability analysis, and claim that the personal property tax on stock must be stricken in its entirety. In support of their argument, they point to the fact that the legislature has recently rejected a proposed bill which included a provision which would have extended the personal property tax to all classes of stock. Amendments to Senate Bill No. 2, 11/18/1996, A-7450, Printer's No. 2328. The Annenbergs claim that when the legislature rejected this proposed bill, it sent the clear message that it did not desire the stock clause of the personal property tax to apply to all classes of stock. They contend that were this Court to sever the statute so that the personal property tax would apply to all classes of stock, we would be altering the contours of the personal property tax in a fashion which the legislature

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prior to 1937. 1 Pa.C.S. § 1502(a)(1)(i). There is an exception to that general rule, however, which states that where the Statutory Construction Act merely codified existing statutory construction law, then those particular provisions of the Statutory Construction Act shall be applied to statutes enacted prior to 1937. 1 Pa.C.S. § 1502(b).

The principles of severability as set forth in 1 Pa.C.S. § 1925 are clearly a restatement of the law as it existed prior to 1937. *See Com. ex rel. Woodruff v. Humphrey*, 136 A. 213, 216 (Pa. 1927); *Rothermel v. Meyerle*, 136 Pa. 250, 20 A. 583 (1890). Thus, pursuant to 1 Pa.C.S. § 1502(b), we shall apply 1 Pa.C.S. § 1925 to this matter.

specifically rejected three years ago. They conclude by stating that in doing so, we would be thwarting the demonstrated intent of a contemporary legislative body and would thus be overstepping the powers allotted to us to sever statutes.

The Annenbergs' argument fails for two reasons. First, as noted by the Intervenor-Counties, only a miniscule portion of the rejected bill concerned the stock clause of the personal property tax. Thus, in the absence of any evidence from the legislative history which would establish that the bill was voted down because of the expansion of the scope of the stock clause, it cannot necessarily be inferred that the current legislature would be opposed to severing the void portions of this statute.

Second, and far more importantly, the Annenbergs' argument is inapt as it requests that we focus not on the intent of the legislature which enacted the void provision of this statute, but rather on the intent that can possibly be inferred from the rejection of a bill by a legislative body more than one hundred years after the statute was enacted. We find such an analysis not in accord with our rules of statutory construction. 1 Pa.C.S. § 1925 demands that we sever the void provision of the statute unless "it cannot be presumed the General Assembly would have enacted the remaining valid provisions without the void one. . . . " Clearly, Section 1925 funnels our inquiry to examining what the enacting legislature would have done had it known that the exemption it placed in the stock clause was unconstitutional. The statute does not, as the Annenbergs would have us interpret it, instruct us to examine what subsequent legislatures would have

intended vis-a-vis the personal property tax. Thus, we reject the Annenbergs' argument on this point.

Next, the Annenbergs argue that were we to sever the void provision from the stock clause, thereby expanding the stock clause to encompass classes of stock which had previously eluded the tax, we would be violating the separation of powers doctrine as the power to tax lies solely with the legislature. We reject this contention. When this Court severs a void provision from a statute, it is doing so to attempt to effectuate legislative intent. We are therefore not arrogating to ourselves the power to tax but rather are attempting to determine how the legislature would have exercised its taxing power had it known, in 1889, that the exclusion was void.

The Annenbergs' final contention regarding severability is that the unconstitutional portion of the stock clause is an exclusion rather than an exemption; from this point, the Annenbergs apparently argue that this Court can never sever an unconstitutional exclusion from a taxing statute. Whether the phrase in question is deemed an exemption or an exclusion, the severability analysis is unaffected.[11] Regardless of how the void provision is classified, our task is to determine whether the legislature would have enacted the remainder of the statute without

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[11] As noted by the Intervenor-Counties, there appears to be only one legal distinction between an exclusion and an exemption: an exclusion is to be construed against the taxing authority while an exemption is to be construed against the taxpayer. *Ernest Renda Constructing Co., Inc. v. Commonwealth*, 532 A.2d 416, 420 (Pa. 1987); *Deigendesch v. County of Bucks*, 482 A.2d 228, 232 (Pa. 1984). Such a distinction, however, has no impact on this severability analysis.

the void portion had it known that the void portion was unconstitutional. There is no rule of statutory construction which forbids us from severing void exclusions. Furthermore, such a narrow and arbitrary rule would be most peculiar in light of the strong public policy favoring severability.

For the foregoing reasons, we reject the Annenbergs' arguments against severability and sever the exclusion. The net effect of this severance is that stock which had previously escaped the personal property tax due to the fact that the companies in which that stock was held owed either the corporate stock or franchise taxes will now be subject to the personal property tax.

Having determined that the void provision is severable, we turn to the question of what retrospective remedy, if any, is due to the Annenbergs. At the outset, however, we must dispose of the claim made by the Intervenor-Counties that we cannot address this issue as the Annenbergs requested only declaratory and injunctive relief, and did not request any form of monetary relief in their Petitions for Review.

We find that the Intervenor-Counties' interpretation of the Annenbergs' Petitions for Review and of our concomitant power to award relief is exceedingly narrow. Where plaintiffs make a general prayer for relief,

> the court may grant any appropriate relief that conforms to the case made by the pleadings although it is not exactly the relief which has been asked for by the special prayer. . . . Under the prayer for general relief, the plaintiffs are entitled to such relief as is agreeable to the case

> made in the bill, though different from the specific relief prayed for.

Lower Frederick Township v. Clemmer, 543 A.2d 502, 512 (Pa. 1988) (quoting *Meth v. Meth*, 62 A.2d 848, 849 (Pa. 1949)).

In the Annenbergs' Petitions for Review filed with this Court, they requested that we award the "relief sought in their Petition[s] for Review . . . filed with the Commonwealth Court on March 27, 1996. . . . " *Annenberg* Petition for Review, filed on 1/03/1997 and docketed at 003 Misc. Dkt. 1997, at 2; *Annenberg* Petition for Review, filed on 1/03/1997 and docketed at 004 Misc. Dkt. 1997, at 2. In their Petitions for Review filed with the Commonwealth Court, the Annenbergs made a general prayer for relief. *Annenberg* Petition for Review, filed on 3/27/1996 and docketed at No. 343 M.D. 1996, at 9; *Annenberg* Petition for Review, filed on 3/27/1996 and docketed at No. 344 M.D. 1996, at 11. Clearly, although not specifically requested, addressing the issue of whether monetary relief is warranted in this matter, where the constitutionality of a taxing provision is challenged, would be within our power. *See Lower Frederick Township.*

Furthermore, addressing this issue would be consistent with our oft-stated principle that we "liberally construe" our civil and appellate procedure rules in order to achieve the interests of justice in an expeditious fashion. *Peters Creek Sanitary Authority v. Welch*, 681 A.2d 167, 170 (Pa. 1996) (citing Pa.R.C.P. 126); Pa.R.A.P. 105. It is undisputed that the Annenbergs squarely challenged the constitutionality of the stock clause and have properly filed claims for refunds with the Board of Assessment Appeals. Clearly, if we do not review at this juncture what relief is

due to the Annenbergs, we shall most likely be compelled to review this issue later after the Board of Assessment Appeals is left to grapple with it without any direction from this Court.

The Intervenor-Counties also argue that if the remedy issue is to be addressed, we should not decide it at this juncture but rather should send the matter back to President Judge Smyth to hold another hearing on this issue. We find such a course of action unnecessary. Unlike the compensatory tax issue, a complicated factual issue for which a hearing was required, this issue is purely legal. The parties have fully briefed this issue; we see no need to delay judgment by ordering yet another hearing be held.

Now we turn to the substance of this issue. President Judge Smyth in his Interim Report concluded that

> [s]ince the exclusions are unconstitutional, leaving a valid tax, [the Counties] should be permitted to retain and collect the personal property tax on stock that is not subject to the capital stock or franchise taxes. On the other hand, taxpayers and counties planned their fiscal affairs based on the assumption that stock subject to the capital stock and franchise taxes were not taxable under the personal property tax. [The Counties] should not be allowed to collect tax retroactively on what was believed to be exempt. Since the tax base will be expanded, [the Counties] may wish to exercise their option to impose the tax, if they impose it at all, at a lower rate. Therefore collection of the personal property tax on stock that was formerly not

> taxed should operate prospectively only, following the adoption of new tax resolutions or ordinances.

Interim Report at 26. The net effect of President Judge Smyth's recommendation would be that the status quo for prior taxing years would be maintained: the tax which had been previously collected would be retained by the Counties, but the tax would not be retroactively collected on stock held in companies which had been subject to the capital stock or franchise tax. Furthermore, the expanded tax which resulted from severing the void provision from the stock clause would apply only to future tax years.

The United States Supreme Court was confronted with a nearly identical situation in *McKesson v. Division of Alcoholic Beverages and Tobacco, Dept. of Business Regulation of Florida*, 496 U.S. 18 (1990). In *McKesson*, the Florida Supreme Court held that a taxing provision which favored in-state products violated the Commerce Clause. The Florida Supreme Court, however, declared that its ruling would be purely prospective only and the taxpayers would not be entitled to a retrospective remedy.

The United States Supreme Court held that this was error, stating that the "State [must] provide meaningful backward-looking relief to rectify any unconstitutional deprivation." *Id.* at 31. The Supreme Court noted that the Due Process Clause of the Fourteenth Amendment compelled such a duty and required that the State fashion a backwards looking remedy whereby those who had paid the tax were put in the same position as those taxpayers who had been favored by the unlawful exemption. *Id.* at 43. The Court, however, did not bind the state's hands in choosing what type of backward looking remedy it would

employ. Rather, the Court held that State could cure the invalidity by: (1) refunding the difference between the tax paid and the tax that would have been assessed had the taxpayer been granted the unlawful exemption; (2) assessing and collecting back taxes, to the extent consistent with other constitutional restrictions,[12] from those who benefited from the unlawful exemption during the contested tax period, calibrating the retroactive assessment to create in hindsight a nondiscriminatory scheme; or (3) applying a combination of a partial refund and a

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[12] Regarding these "other constitutional restrictions," the United States Supreme Court stated:

> We previously have held that the retroactive assessment of a tax increase does not necessarily deny due process to those whose taxes are increased, though beyond some temporal point the retroactive imposition of a significant tax burden may be "so harsh and oppressive as to transgress the constitutional limitation," depending on "the nature of the tax and the circumstances in which it is laid." *Welch v. Henry*, 305 U.S. 134, 147 (1938). *See United States v. Hemme*, 476 U.S. 558 (1986); *United States v. Darusmont*, 449 U.S. 292 (1981); *cf. United States v. Sperry Corp.*, 493 U.S. 52, ___ (1989) (slip op. at 12) ("It is surely proper for congress to legislate retrospectively to ensure that costs of a program are borne by the entire class of persons that Congress rationally believes should bear them"); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976) ("Legislation readjusting rights and burdens is not unlawful solely because it upsets the otherwise settled expectations. This is true even though the effect of the legislation is to impose a new duty or liability based on past acts") (citations omitted).

496 U.S. at 40 n.23.

partial retroactive assessment, so long as the resultant tax actually assessed during the contested tax period reflects a scheme that does not discriminate against interstate commerce. *Id.* at 40-41.

Our review of *McKesson* makes it clear that the United States Constitution dictates that some retroactive remedy is due here so that the prior unconstitutional discrimination is rectified. The Counties, however, contend that we are not so constrained. Rather, they claim that we do indeed have the power to decide whether the determination that the stock clause is unconstitutional will apply retroactively only, thus denying the Annenbergs a retrospective remedy. In support of this argument, they cite this Court's decision in *American Trucking Associations, Inc. v. McNulty*, 596 A.2d 784 (Pa. 1991).

McNulty was the last case in a series of cases, from both this and the United States Supreme Court, which concerned the constitutionality of highway use taxes. In *American Trucking Associations, Inc. v. Scheiner*, 483 U.S. 266 (1987), the United States Supreme Court reversed the judgment of this Court, *see American Trucking Associations, Inc. v. Scheiner*, 509 A.2d 838 (Pa. 1986), and held that certain highway use taxes violated the Commerce Clause. The *Scheiner* Court then remanded the matter to this Court "to consider whether [the] ruling should be applied retroactively and to decide other remedial issues." *Scheiner*, 483 U.S. at 297.[13]

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[13] The *Scheiner* matter was recaptioned after remand to this Court from the United States Supreme Court as James I. Scheiner, Secretary of the Department of Revenue, was replaced in his position by Eileen McNulty. Pursuant to Pa.R.A.P. 502(c),

After the *McNulty* matter was remanded to this Court, the United States Supreme Court granted certiorari in *American Trucking Associations, Inc. v. Smith*, 496 U.S. 167 (1988), to address the question of whether the *Scheiner* decision should be applied retroactively. We held our decision in the remanded *McNulty* matter pending the United States Supreme Court's decision in *Smith*.

The United States Supreme Court in *Smith* was unable to come to a consensus and issued a plurality opinion. The *Smith* Court plurality determined that state courts were not compelled to apply *Scheiner* retroactively. In reaching this conclusion, it applied the three factor test annunciated by the United States Supreme Court in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971).[14]

Once the *Smith* plurality opinion was issued, this Court held in *McNulty* that retrospective relief in the form of a refund was not warranted. In making this determination, we relied on the plurality opinion in *Smith*. The Counties would have us apply our decision in the matter *sub judice* prospectively only in reliance on our *McNulty* decision.

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the case was recaptioned *American Trucking Associations v. McNulty*.

[14] For decades, the *Chevron Oil* test was the accepted standard, in federal courts as well as many state courts, for determining whether a decision was to be applied retroactively. The three part test states that a court may opt for a decision to have purely prospective effect where: (1) the decision establishes a new principle of law; (2) retroactivity would not further, and could perhaps retard, application of the new rule; and (3) retroactive application could produce substantial inequitable results.

In presenting this argument, however, the Counties have failed to take cognizance of the fact that there has been a change in the law of retroactivity since the *Smith* plurality issued its opinion. Subsequent to *Smith*, the Supreme Court overruled *Chevron Oil* insofar as it permitted a court to determine selectively whether it would apply a new rule of law prospectively only. *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 97 (1993); *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 751-53 (1995). The Court stated that where the "court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule." *Harper*, 509 U.S. at 97. As the rule announced in the United States Supreme Court's decision in *Fulton* controls this matter and there is no question that the Supreme Court applied *Fulton* to the parties before it, pursuant to *Harper*, we, too, must apply the *Fulton* rule retroactively.

The Counties, however, argue that decisions of the United States Supreme Court on retroactivity are not controlling, but are merely persuasive as this Court has stated that such issues are "squarely within the province of the state courts," *Blackwell v. State Ethics Comm'n*, 589 A.2d 1094, 1098 (Pa. 1991). This analysis is incorrect. Where the legal question involved is a federal one, the United States Supreme Court has quite plainly decreed that the federal doctrine of retroactivity cannot be circumscribed by the state courts. The United States Supreme Court has stated that "[t]he Supremacy Clause,

U.S. Const., Art. VI, cl. 2, does not allow federal retroactivity doctrine to be supplanted by the invocation of a contrary approach to retroactivity under state law. Whatever freedom state courts may enjoy to limit the retroactive operation of their own interpretations of state law . . . cannot extend to their interpretations of federal law." *Harper*, 509 U.S. at 86, 100 (citations omitted). This matter involves the Commerce Clause of the United States Constitution, which is clearly an issue of federal law. Thus, we are compelled to apply the *Harper* rule of retroactivity.

Although the United States Supreme Court has crafted a broad range of remedies permissible under the United States Constitution, *see supra*, the Annenbergs argue that once this Court has determined that as a matter of constitutional law they are entitled to a remedy, then statutory law dictates that only one type of remedy is allowed: the money that they had paid pursuant to the discriminatory stock clause of the personal property tax must be immediately tendered to them, plus any statutory interest which is owed. In support of this argument, the Annenbergs cite to 72 P.S. § 5566b. Section 5566b, in relevant part, reads as follows:

> § 5566b. Refund of taxes, etc., to which political subdivision is not legally entitled; interest
>
> (a) Whenever any person or corporation of this Commonwealth has paid or caused to be paid, or hereafter pays or causes to be paid, into the treasury of any political subdivision, directly or indirectly, voluntarily or under protest, any taxes of any sort, license fees, penalties, fines or any other moneys *to which the political*

> *subdivision is not legally entitled*; then, in such cases, the proper authorities of the political subdivision, upon the filing with them of a written and verified claim for the refund of the payment, are hereby directed to make, out of budget appropriations of public funds, refund of such taxes, license fees, penalties, fines or other moneys to which the political subdivision is not legally entitled. Refunds of said moneys shall not be made, unless a written claim therefor is filed, with the political subdivision involved, within three years of payment thereof.

72 P.S. § 5566b(a) (emphasis supplied). In its simplest terms, Section 5566b provides a mechanism for the refund of taxes "to which the political subdivision is not legally entitled."

However, Section 5566b is inapplicable to this case. We have not concluded that the Counties are not legally entitled to levy a personal property tax on corporate stock holdings. Rather, we have determined that in levying a personal property tax on corporate stock holdings, the Counties are not legally entitled to grant the exemption contained in 72 P.S. § 4821 to stock in corporations which have a taxable nexus with Pennsylvania because doing so discriminates against interstate commerce in violation of the Commerce Clause. By severing the exclusionary language in the stock clause which renders the stock clause unconstitutional, we have left intact the Counties' ability to levy a personal property tax on corporate stock holdings generally.

The tax levied by Montgomery County on the Annenbergs' corporate stock holdings constituted a tax to which

Montgomery County *was legally entitled*. It was the granting of the exemption limited to the Annenbergs' stock in corporations which have a taxable nexus with Pennsylvania which constituted the illegal act by Montgomery County. Since 72 P.S. § 5566b limits its mandated refund to taxes which a political subdivision is not legally entitled, it is inapplicable to a case such as this. Montgomery County has *not* levied a tax to which it was not legally entitled, but has instead *granted an illegal exemption* from a tax to which it was legally entitled.[15] Section 5566b does

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[15] In making the argument that our discretion in fashioning a suitable remedy is limited by Section 5566b, the dissent implies that it is improper, upon concluding that a portion of a taxing scheme is unconstitutional, to allow the taxing authority to keep the taxes previously levied and collect back taxes from those who benefited from the unconstitutional portion. In doing so, the dissent suggests that the United States Supreme Court countenanced an improper and unlawful remedy in *McKesson*. The final two remedies outlined by the United States Supreme Court in *McKesson* allow the taxing authority to retain the taxes, or a portion thereof, previously levied under an unconstitutional taxing scheme as long as back taxes are collected from those who benefited from the unlawful exemption, so as to "create in hindsight a nondiscriminatory scheme." The dissent's conclusion implies that the United States Supreme Court sanctioned a remedy in *McKesson* which would allow the state of Florida to retain taxes which it was not entitled to as a matter of law. We find it quite unlikely that the United States Supreme Court committed such a glaring oversight. Rather, the choice of remedies provided by the United State Supreme Court in *McKesson* ensures that the tax which is actually imposed "does not deprive [the taxpayer] of tax moneys in a manner that discriminates against interstate commerce." *McKesson*, 496 U.S. at 42.

not therefore limit the broad range of remedies permissible under the United States Constitution to the refund of taxes collected by the Counties.

In sum, we hold that the stock clause is not a compensatory tax and the portion of the stock clause which excludes from the personal property tax stock held in companies which are subject to the capital stock and franchise taxes is therefore unconstitutional; that the void exclusionary language of the stock clause is severable; and that the Counties must forthwith provide a retrospective remedy consistent with this opinion.

Jurisdiction is relinquished.

Mr. Justice Cappy files a concurring and dissenting opinion in which Mr. Justice Nigro joins.

CONCURRING AND DISSENTING OPINION

MR. JUSTICE CAPPY **DECIDED: JUNE 1, 2000**

I agree with the Majority that the Counties have failed to carry their burden of showing that the stock clause of the personal property tax is a compensatory tax and that the stock clause therefore violates the Commerce Clause of the United States Constitution.[1] Furthermore, I agree that the exemption should be severed. I cannot, however, agree with the Majority's conclusion as to what

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[1] U.S. Const. art. I, § 8, cl. 3.

remedy is due; I therefore respectfully dissent as to that portion of the Majority's opinion.

As noted by the Majority, the Annenbergs argue that once this court has determined that constitutional law mandates that they are entitled to a remedy for the unconstitutional collection of this tax, then statutory law dictates that only one type of remedy is allowed: a refund. In support of this argument, the Annenbergs cite to 72 P.S. § 5566b, a statute which dictates that when a governmental entity has collected a tax to which it "is not legally entitled," it shall provide a "refund of such taxes" to the taxpayer.

The Majority, however, rejects this argument. Instead, it notes that the United States Supreme Court's decision in *McKesson v. Division of Alcoholic Beverages and Tobacco, Dept. of Business Regulation of Florida*, 496 U.S. 18, 31 (1990) did not mandate that a refund must always issue whenever it is determined that a tax has been unconstitutionally collected, but rather allowed the State great leeway in fashioning a backward-looking remedy. The Majority contends that this court, in fashioning a remedy in the matters *sub judice*, has that myriad of options available to it; it posits that our discretion is not circumscribed by the legislature's pronouncement that the only remedy for an illegally collected tax is a refund to the taxpayer. Rather, the Majority stridently contends that the dictates of 72 P.S. § 5566b do not apply here because "Montgomery County has *not* levied a tax to which it was not legally entitled, but has instead *granted an illegal exemption* from a tax to which it was legally entitled." Majority slip op. at 23 (emphasis in the original).

I believe that the reasoning espoused by the Majority is internally inconsistent. First, the Majority finds that the stock clause violates the Commerce Clause. The Counties' collection of the personal property tax on stock held by taxpayers in out-of-state entities was therefore unconstitutional. And yet, the Majority paradoxically proceeds to hold that the Counties were nonetheless legally entitled to collect this tax, and the provisions of 72 P.S. § 5566b therefore do not apply. With all due respect, I simply cannot fathom how the Majority can logically conclude both that a tax was unconstitutionally collected and that the Counties were legally entitled to collect that very same tax.

The legislature has plainly stated that where a tax has been collected to which the government entity "is not legally entitled," then the taxpayer shall be given a refund.[2] In my opinion, a tax which was unconstitutionally collected is without question one to which the governmental entity was "not legally entitled." Thus, I believe the only remedy available in the matters *sub judice* is the one mandated by 72 P.S. § 5566b: a refund. As I am not persuaded by the Majority's attempt to avoid this

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[2] I believe that the statutory requirement of providing a "refund" could be met in at least two fashions. One way would be to provide an immediate, lump sum payment of money. Another way of satisfying the dictates of 72 P.S. § 5566b would be to allow the Counties to compensate the affected taxpayers by granting them a credit equal to the amount of taxes illegally collected pursuant to the discriminatory stock clause. This credit could be utilized to offset any taxes owed by that taxpayer to the county, whether those taxes be owed pursuant to the stock clause of the personal property tax or any other tax.

apparently unpalatable conclusion, I must respectfully dissent from this portion of the majority opinion.

Mr. Justice Nigro joins this concurring and dissenting opinion.

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

June 1, 2000 – Case DECIDED and Judgment entered in the following:

Zappala, J.:

Nos. 3 & 4 M. D.
Misc. Docket
1997 J-109-97

WALTER H. AND LEONORE ANNENBERG, Petitioners v. COMMONWEALTH OF PENNSYLVANIA, AND D. MICHAEL FISHER, ATTORNEY GENERAL, ET AL., Respondents

In sum, we hold that the stock clause is not a compensatory tax and the portion of the stock clause which excludes from the personal property tax stock held in companies which are subject to the captial stock and franchise taxes is therefore unconstitutional; that the void exclusionary language of the stock clause is severable; and that the Counties must forthwith provide a retrospective remedy consistent with this opinion.

Jurisdiction is relinquished.

Mr. Justice Cappy files a concurring and dissenting opinion in which Mr. Justice Nigro joins.

APPENDIX B

[J-109-97]

IN THE SUPREME COURT OF PENNSYLVANIA

MIDDLE DISTRICT

WALTER H. and LEONORE ANNENBERG, Petitioners v. COMMONWEALTH OF PENNSYLVANIA and MICHAEL D. FISHER, ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA and BOARD OF COMMISSIONERS OF THE COUNTY OF MONTGOMERY, being RICHARD BUCKMAN, JOSEPH HOEFFEL and MARIO MELE (solely in their official capacities), and BOARD OF ASSESSMENT APPEALS OF THE COUNTY OF MONTGOMERY, and COUNTY OF MONTGOMERY, Respondents	)	No. 003 Miscellaneous Docket 1997 Exercise of Plenary Jurisdiction

WALTER H. ANNENBERG, as Sole Trustee of the Trust Under Will of Moses L. Annenberg,	)	No. 004 Miscellaneous Docket 1997
Petitioners	)	Exercise of Plenary Jurisdiction
v.	)	
COMMONWEALTH OF PENNSYLVANIA and MICHAEL D. FISHER, ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA and BOARD OF COMMISSIONERS OF THE COUNTY OF MONTGOMERY, being RICHARD BUCKMAN, JOSEPH HOEFFEL and MARIO MELE (solely in their official capacities), and BOARD OF ASSESSMENT APPEALS OF THE COUNTY OF MONTGOMERY, and COUNTY OF MONTGOMERY,	)	
Respondents	)	

ORDER

PER CURIAM

AND NOW, this 7th day of April, 1998, this court holds that 72 P.S. § 4821 facially discriminates against interstate commerce. Furthermore, it is hereby ORDERED that this matter is to be transferred to the Court of Common Pleas of Montgomery County, where the President Judge shall assign a judge to hold a hearing on the following issues:

1. Whether 72 P.S. § 4821 is a "compensatory tax" as defined by *Fulton Corp. v. Faulkner*, 516 U.S. 325 (1996).

2. If it is determined that 72 P.S. § 4821 is not a "compensatory tax," and that 72 P.S. § 4821 is therefore unconstitutional as it violates the Commerce Clause of the United States Constitution, what is the appropriate remedy.

We direct that within one hundred eighty (180) days of this order, the Court of Common Pleas of Montgomery County shall transmit to this court findings of fact and conclusions of law on the above-listed issues. Furthermore, because the case calls into question the constitutionality of a statute, the Attorney General is invited to participate. *Cf.* Pa.R.A.P. 521.

Upon the filing of the findings of fact and the conclusions of law with this court, the Prothonotary of the Supreme Court shall set a briefing schedule for the filing of briefs with this court.

Jurisdiction is retained.

TRUE AND CORRECT COPY:
April 7, 1998

/s/ Shirley Bailey
SHIRLEY BAILEY,
CHIEF CLERK

[J-109-1997]

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

WALTER H. and LEONORE ANNENBERG, Petitioners v. COMMONWEALTH OF PENNSYLVANIA and MICHAEL D. FISHER, ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA and BOARD OF COMMISSIONERS OF THE COUNTY OF MONTGOMERY, being RICHARD BUCKMAN, JOSEPH HOEFFEL and MARIO MELE (solely in their official capacities), and BOARD OF ASSESSMENT APPEALS OF THE COUNTY OF MONTGOMERY, and COUNTY OF MONTGOMERY, Respondents	)	No. 003 & 004 Miscellaneous Docket 1997 Exercise of Plenary Jurisdiction SUBMITTED: May 15, 1997

OPINION

MR. JUSTICE CAPPY DECIDED: APRIL 7, 1998

We exercised plenary jurisdiction[1] over these matters to determine whether § 4821 of the Act of June 17, 1913,

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[1] 42 Pa.C.S. § 726.

P.L. 507, *as amended*, 72 P.S. §§ 4821-4902, is unconstitutional as it violates the Commerce Clause of the United States Constitution, U.S. Const. art. I, § 8, cl. 3. For the following reasons, we determine that 72 P.S. § 4821 facially discriminates against interstate commerce. Furthermore, we direct that the Court of Common Pleas of Montgomery County conduct a hearing on issues related to whether § 4821 is a "compensatory tax".

Walter H. Annenberg, as the Sole Trustee for the Trust under the Will of Moses L. Annenberg, and Walter H. and Leonore Annenberg (collectively, the "Annenbergs") filed petitions for review in the nature of a complaint for declaratory and injunctive relief in the Commonwealth Court's original jurisdiction[2] against the Commonwealth of Pennsylvania and Thomas W. Corbett, Jr., Attorney General (collectively, the "Commonwealth") and also against the Board of Commissioners of the County of Montgomery and each Commissioner in his official capacity, the Board of Assessment Appeals of the County and the County itself (collectively, the "County"). The Annenbergs sought a declaration that § 4821 violates the Commerce Clause of the United States Constitution and is therefore null and void insofar as it imposes a tax on any corporate stock held by them.[3] They also

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[2] 42 Pa.C.S. § 761.

[3] The 1996 fair market value of stock held by the Trust under the Will of Moses L. Annenberg in foreign corporations not doing business in Pennsylvania was $725,994,938.00. R.R. at 39a. The 1996 fair market value of the stock held by Walter and Leonore Annenberg in foreign corporations not doing business in Pennsylvania was $120,535,800.00. R.R. at 23a.

requested a permanent injunction against the Commissioners and the Board of Assessment Appeals prohibiting them from imposing and collecting the tax on any shares of corporate stock that the Annenbergs own.

The Commonwealth and the County filed preliminary objections. They asserted that the Commonwealth was not an "indispensable party" and therefore there was no basis for the Commonwealth Court to exercise its original jurisdiction under 42 Pa.C.S. § 761. The Commonwealth Court agreed. By order dated December 23, 1996, it sustained the preliminary objections and ordered that this matter be transferred to the Court of Common Pleas of Montgomery County sitting in equity.

On January 3, 1997, the Annenbergs petitioned this court to exercise its plenary jurisdiction over these actions. On January 31, 1997, we granted the Annenbergs' petition limited to the issue of whether § 4821 is constitutional.

Our standard of review in examining whether a taxation provision is unconstitutional is whether the statute clearly, palpably and plainly violates the Constitution. *Leonard v. Thornburgh*, 507 Pa. 317, 489 A.2d 1349 (1985). As with any question of law, our scope of review is plenary. *Phillips v. A-BEST Products Co.*, 542 Pa. 124, 130, 665 A.2d 1167, 1170 (1995).

The Commerce Clause enables the Congress "[t]o regulate Commerce . . . among the several States. . . . " U.S. Const., art. I, § 8, cl. 3. The Framers included such a provision in the Constitution because they were convinced "that in order to succeed, the new Union would

have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Hughes v. Oklahoma*, 441 U.S. 322, 325, 99 S. Ct. 1727, 1731, 60 L. Ed. 2d 250, 255 (1979). Thus, although it is phrased as a grant of regulatory power to the Congress, the Commerce Clause has long been understood to have a "negative" aspect which denies states the power to discriminate unjustifiably against or burden the interstate flow of articles of commerce. *See Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 115 S. Ct. 1331, 131 L. Ed. 2d 261 (1993).

In examining whether a state law violates the negative Commerce Clause, we first must determine whether the provision at issue is facially discriminatory. The term " 'discrimination' simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Systems, Inc. v. Department of Environmental Quality of Oregon*, 511 U.S. 93, 99, 114 S. Ct. 1345, 1350, 128 L. Ed. 2d 13, 21 (1994). State laws discriminating against interstate commerce on their face are "virtually *per se* invalid." *Id.*

Where a taxation statute has been determined to discriminate against interstate commerce, a state may overcome the presumption of invalidity by showing that the statute is a " 'compensatory tax' designed simply to make interstate commerce bear a burden already borne by intrastate commerce," *Fulton Corp. v. Faulkner*, 516 U.S. 325, 331, 116 S. Ct. 848, 854, 133 L. Ed. 2d 796, 805 (1996) (citations omitted). It must be shown that the tax

"advances a legitimate local purpose that cannot be adequately served by reasonably nondiscriminatory alternatives." *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 278, 108 S. Ct. 1803, 1810, 100 L. Ed. 2d 302, 311 (1988). The state bears a heavy burden in making this showing: it must establish that the justifications for the discriminatory restrictions on commerce pass the strict scrutiny test. *Hughes v. Oklahoma*, 441 U.S. 322, 337, 99 S. Ct. 1727, 1737, 60 L. Ed. 2d 250, 262 (1979). This burden is so heavy that "facial discrimination itself may be a fatal defect." *Id.*

Section 4821 dictates that the owners of several classes of personal property shall be taxed at the rate of 4 mills per annum. In addressing the Commerce Clause issue raised in the matters *sub judice*, we are concerned with only one of these classes of property. The portion of the statute which defines that particular class reads as follows:

> [the personal property tax shall be due on] all shares of stock in any bank, corporation, association, company or limited partnership, created or formed under the laws of this Commonwealth or of the United States, or of any other state or government, except shares of stock in any bank, bank and trust company, national banking association, savings institution, corporation, or limited partnership liable to a tax on its shares or a gross premiums tax, or liable to or relieved from the capital stock or franchise tax for State purposes under the laws of this Commonwealth. . . .

72 P.S. § 4821. (This clause shall hereinafter be referred to as the "stock clause".) The capital stock and franchise

taxes referenced in the stock clause apply to those businesses which were either incorporated in Pennsylvania or are doing business in Pennsylvania.[4] Thus, the only stock on which an owner is liable to pay tax pursuant to the stock clause is on stock in foreign corporations which do not do business in Pennsylvania.

The Annenbergs assert that § 4821 facially discriminates against interstate commerce since the tax is owed only on stock owned in entities which were not incorporated in or do business in Pennsylvania. They premise their argument primarily on the United States Supreme Court's recent decision in *Fulton, supra.*

At issue in *Fulton* was North Carolina's "intangibles tax" on the fair market value of shares of stock owned by its residents. Under North Carolina's taxation scheme, resident taxpayers were taxed on the value of corporate stock they owned, but were entitled to calculate their tax liability by taking a "taxable percentage deduction" equal to the percentage of the issuing corporation's income subject to tax in North Carolina. *Id.* at ___, 116 S. Ct. at 852, 133 L. Ed. 2d at 803. Under this formula, the more business a corporation did in North Carolina, the lower

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[4] Companies organized under the laws of this Commonwealth are subject to the capital stock tax. 72 P.S. § 7602(a). The franchise tax is owed by foreign entities. 72 P.S. § 7602(b). "Foreign entity" is defined as an organization which does "business in . . . the Commonwealth or carr[ies] on activities in the Commonwealth, including solicitation or either owning or having capital or property employed or used in the Commonwealth. . . . " 72 P.S. § 7601.

the intangibles tax on stock in the corporation held by North Carolina residents.[5]

The United States Supreme Court determined that the North Carolina intangibles tax facially discriminated against interstate commerce. A unanimous Court pronounced that

> [a] regime that taxes stock only to the degree that its issuing corporation participates in interstate commerce favors domestic corporations over their foreign competitors in raising capital among North Carolina residents. . . .

Id. at ___, 116 S. Ct. at 855, 133 L. Ed. 2d at 806.

The Annenbergs assert that like the North Carolina intangibles tax, § 4821 discriminates against interstate commerce. They state that this discrimination is obvious since stock of foreign corporations which do not do business in or have a taxable nexus with Pennsylvania are subject to the tax whereas stock of corporations which were incorporated in or have some taxable nexus with this Commonwealth are exempt.

The County argues strenuously that § 4821 is not facially discriminatory. Its primary argument is that the Annenbergs have not shown that § 4821 has in fact had a negative impact on interstate commerce. The County seems to misapprehend the nature of the inquiry here. As

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[5] For example, "a corporation doing all of its business within North Carolina would pay the corporate income tax on 100% of its income, and the taxable percentage deduction allowed to resident owners of that corporation's stock under the intangibles tax would likewise be 100%." *Fulton*, 516 U.S. at ___, 116 S. Ct. at 852, 133 L. Ed. 2d at 803.

a matter of semantics, when we examine whether a statute is facially discriminatory, we need only look to the language of the statute. Once we have determined that a statute is indeed facially discriminatory, we need not also determine the actual impact of the discriminatory tax. *See Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 579, 106 S. Ct. 2080, 2084, 90 L. Ed. 2d 552, 559 (1986); *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388, 406-407, 104 S. Ct. 1856, 1867, 80 L. Ed. 2d 388, 403 (1984).

The County also asserts that *Fulton* does not control this matter because the North Carolina taxing scheme placed a more onerous burden on interstate commerce than § 4821 does. This argument must be rejected. The United States Supreme Court has stated quite clearly that the magnitude of the negative impact on interstate commerce is irrelevant in determining whether a state provision violates the Commerce Clause. *Associated Industries of Missouri v. Lohman*, 511 U.S. 641, 114 S. Ct. 1815, 128 L. Ed. 2d 639 (1994).

We agree with the Annenbergs that the stock clause of § 4821 is facially discriminatory. The tax is imposed on the stock of foreign corporations which do not do business in or have a taxable nexus with Pennsylvania, while the stock of corporations which do business in or otherwise have a taxable nexus with this Commonwealth is exempted. The discrimination against foreign corporations, and the preferential treatment afforded corporations which were either incorporated in Pennsylvania or do business in Pennsylvania, is plain to see. It is beyond peradventure that the § 4821 facially discriminates against interstate commerce.

As we stated above, once a determination has been made that a statute is facially discriminatory, the burden then shifts to the state to establish that the statute "advances a legitimate local purpose that cannot be adequately served by reasonably nondiscriminatory alternatives." *New Energy Co.*, 486 U.S. at 278, 108 S. Ct. at 1810, 100 L. Ed. 2d 302 at 311. In the language of *Fulton*, there are

> three conditions necessary for a valid compensatory tax. First, a State must, as a threshold matter, identif[y] . . . the intrastate tax burden for which the State is attempting to compensate. Second, the tax on interstate commerce must be shown roughly to approximate – but not exceed – the amount of the tax on intrastate commerce. Finally, the events on which the interstate and intrastate taxes are imposed must be substantially equivalent; that is, they must be sufficiently similar in substance to serve as mutually exclusive prox[ies] for each other.

516 U.S. at 332-333, 116 S. Ct. at 854-855, 133 L. Ed. 2d at ___ (citations and internal quotation marks omitted).

It is apparent that these inquiries contain a significant factual component and can be properly addressed only in the context of a hearing at which the parties may introduce evidence to support their respective positions. Accordingly, pursuant to the attached order, we order the Court of Common Pleas of Montgomery County to hold a

hearing on issues related to whether § 4821 is a compensatory tax. Jurisdiction is retained.[6]

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[6] The Annenbergs also filed two ostensible direct appeals challenging the Commonwealth Court's decision that it lacked original jurisdiction over the Annenbergs complaint. *See* Nos. 2 and 3 Middle District Appeal Docket 1997. We have yet to note probable jurisdiction in these matters. We shall hold these matters in abeyance pending relinquishment of our jurisdiction in the matters *sub judice*.

APPENDIX C
CONSTITUTION OF THE UNITED STATES
ARTICLE 1

Section. 8. The Congress shall have Power . . .

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

* * *

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX D

72 P.S. § 4821. Four mill tax on loans, credits, securities, etc., for county and city purposes; exceptions

All personal property of the classes hereinafter enumerated, owned, held or possessed by any resident, which, as used in this section, shall mean any person, persons, copartnership, or unincorporated association or company, resident, located, or liable to taxation within this Commonwealth, or by any joint-stock company or association, limited partnership, bank or corporation whatsoever, formed, erected or incorporated by, under, or in pursuance of any law of this Commonwealth or of the United States, or of any other state or government, and liable to taxation within this Commonwealth, whether such personal property be owned, held, or possessed by such resident in his, her, their or its own right, or as active trustee, agent, attorney-in-fact, or in any other capacity, or by any resident as trustee, agent or attorney-in-fact, jointly with one or more trustees, agents or attorney-in-fact, domiciled in another state, where such personal property is held and managed in this Commonwealth, except as executor or administrator of the estate of a non-resident decedent, and except as trustee for a resident or non-resident religious, charitable or educational organization, no part of the net earnings of which inures to the benefit of any private stockholder or individual for the use, benefit, or advantage of any other person, copartnership, unincorporated association, company, joint-stock company, or association, limited partnership, bank or corporation, and the equitable interest in any such personal property of the classes hereinafter enumerated, owned, held or possessed by any resident,

where the legal title to such personal property is vested in a trustee, agent, or attorney-in-fact, domiciled in another state, or where the legal title to such personal property is vested in more than one trustee, agent or attorney-in-fact, one or more of whom are domiciled to another state, and one or more of whom are domiciled within this Commonwealth, and such personal property is held and managed in another state, and where such resident is entitled to receive all or any part of the income therefrom – is hereby made taxable annually for county purposes, and, in cities coextensive with counties, for city and county purposes, at the rate of four mills of each dollar of the value thereof, and no failure to assess or return the same shall discharge such owner or holder thereof, from liability therefor, that is to say, –

All mortgages; all moneys owing by solvent debtors, whether by promissory note, or penal or single bill, bond, or judgment; all articles of agreement and accounts bearing interest; all public loans whatsoever, except those issued by this Commonwealth or the United States, and except the public loans and obligations of any county, city, borough, town, township, school district, and incorporated district of this Commonwealth, and except the bonds and obligations of bodies corporate and politic of this Commonwealth, known as municipal authorities; all loans issued by any corporation, association, company, or limited partnership, created or formed under the laws of this Commonwealth or of the United States, or of any other state or government, including car-trust securities and loans secured by bonds or any other form of certificate or evidence of indebtedness, whether the interest be included in the principal of the obligation or payable by

the terms thereof, except such loans as are made taxable for State purposes by section seventeen of the act, approved the twenty-second day of June, one thousand nine hundred thirty-five (Pamphlet Laws 414), as reenacted and amended;[1] all shares of stock in any bank, corporation, association, company, or limited partnership, created or formed under the laws of this Commonwealth or of the United States, or of any other state or government, except shares of stock in any bank, bank and trust company, national banking association, savings institution, corporation, or limited partnership liable to a tax on its shares or a gross premiums tax, or liable to or relieved from the capital stock or franchise tax for State purposes under the laws of this Commonwealth; and all moneys loaned or invested in other states, territories, the District of Columbia or foreign countries; all other moneyed capital owing to individual citizens of the State: Provided, That this section shall not apply to bank notes, or notes discounted or negotiated by any bank or banking institution, savings institution, or trust company, nor to loans, shares of stock, or other securities, held by bankers or brokers solely for trading purposes; nor to accounts or debit balances owing by customers of bankers or brokers in the usual courses of business; nor to interest bearing accounts in any bank or banking institution, savings institution, employes' thrift or savings association, whether operated by employes or the employer, or trust company; nor to personal property held in the commercial department and owned in its own right by a banking institution, savings institution, or trust company, in liquidation by a

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[1] 72 P.S. § 3250-10.

receiver, trustee, or other fiduciary, nor to personal property formerly held by a banking institution in its own right, but assigned by it to one or more trustees for liquidation and payment to the creditors and stockholders of such banking institutions, it being the intent and purpose of this proviso that no tax be assessed or collected for the years one thousand nine hundred and thirty-five, one thousand nine hundred and thirty-six, one thousand nine hundred and thirty-seven, one thousand nine hundred and thirty-eight, one thousand nine hundred and thirty-nine, one thousand nine hundred and forty, and thereafter upon the personal property enumerated herein, nor shall this act apply to the proceeds of any life insurance policy held in whole or in part by the insurer, nor the principal value of annuities nor to any personal property held in any trust, forming part of a stock, bonus, pension or profit sharing plan of an employer for the exclusive benefit of his employes, or their beneficiaries, which trust under the latest ruling of the Commissioner of Internal Revenue is exempted from Federal income tax, nor to any personal property held under the provisions of a plan established by or for an individual or individuals for retirement purposes if such plan meets the requirements for exemption from Federal income tax of income earned on investments held under its provisions: And provided further, That the provisions of this act shall not apply to building and loan associations, or to shares of stock issued by building and loan associations, or to savings institutions having no capital stock; and, if at any time, either now or hereafter, any persons, individuals, or bodies corporate have agreed or shall hereafter agree to issue his, their, or its securities,

bonds or other evidences of indebtedness, clear of and free from the said four mills tax herein provided for, or any part thereof, or have agreed or shall hereafter agree to pay the same, nothing herein contained shall be so construed as to relieve or exempt him, it, or them from paying the said four mills tax on any of the said such securities, bonds, or other evidences of indebtedness, as may be held, owned by, or owing to the said savings institution having no capital stock: And provided further, That the provisions of this act shall not apply to fire companies, firemen's relief associations, life, casualty or fire insurance corporations having no capital stock, secret and beneficial societies, labor unions and labor union relief associations, and all beneficial organizations paying sick or death benefits, or either or both, from funds received from voluntary contributions or assessments upon members of such associations, societies, or unions: And provided further, That corporations, limited partnerships, and joint-stock associations, liable to tax on their shares or the aforesaid capital stock or franchise tax for State purposes, shall not be required to make any report or pay any further tax, under this section, on the mortgages, bonds, and other securities owned by them in their own right; but corporations, limited partnerships, and joint-stock associations, holding such securities as trustees, executors, administrators, guardians, or in any other manner, except as mere custodian for the real owner, and except as executor or administrator of the estate of a nonresident decedent, and except as trustee for a resident or nonresident religious, charitable or educational organization, no part of the net earnings of which inures to the benefit of any private stockholder or individual, shall return and pay the tax imposed by this

section upon all securities so held by them as in the case of individuals: And provided further, That none of the classes of property made taxable by this section for county purposes, and, in cities coextensive with counties, for city and county purposes, shall be taxed or taxable for any other local purpose, under the laws of this Commonwealth: And provided further, That the provisions of this section shall not apply to personal property, of the class hereinabove enumerated, received or acquired with proceeds of money or property received from any person or persons, copartnership, or unincorporated association or company, nonresident in or not located within this Commonwealth, or from any joint-stock company or association, limited partnership, bank or corporation formed, erected, or incorporated by, under or in pursuance of, any law of the United States, or of any state or government other than this Commonwealth, by any person or persons, copartnership, unincorporated association, company, joint-stock company or association, limited partnership, bank, or corporation as active trustee, agent, attorney-in-fact, or in any other capacity, for the use, benefit, or advantage of any person or persons, copartnership, or unincorporated association or company, nonresident in or not located within this Commonwealth, or for the use, benefit or advantage of any joint-stock company or association, limited partnership, bank or corporation formed, erected, or incorporated by, under, or in pursuance of any law of the United States, or of any state or government other than this Commonwealth; nor shall the provisions of this section apply to personal property held for the use, benefit or advantage of any resident who shall have in each of the ten preceding calendar years

given or contributed all of his net income to any corporation organized or operated exclusively for religious, charitable, scientific, literary, or educational purposes.

The value of the equitable interest in any personal property made subject to tax by this section shall be measured by ascertaining the value of the personal property in which such resident has the sole equitable interest, or in case of divided equitable interests in the same personal property, then by ascertaining such part of the value of the whole of such personal property as represents the equitable interest of such resident therein.

For the purposes of this act, the value of any taxable shares of stock issued by any regulated investment company as defined under the provisions of the Federal Internal Revenue Code of 1948,[2] shall be that part of the current value of such shares, to be determined by multiplying said current value by a fraction, the numerator of which shall be the total value of so much of the personal property owned by the regulated investment company as would be taxable by this act if owned by a resident of Pennsylvania and the denominator of which shall be the total value of all of the personal property owned by the regulated investment company.

1913, June 17, P.L. 507, § 1. Amended 1929, April 30, P.L. 871, § 1; 1929, May 2, P.L. 1509, § 1; 1933, April 21, P.L. 54, § 1; 1939, June 19, P.L. 413, § 1; 1941, July 29, P.L. 548, § 1; 1941, July 29, P.L. 552, § 1; 1941, July 29, P.L. 556, § 1; 1945, May 11, P.L. 447, § 1; 1947, June 28, P.L. 1008, § 1; 1952, Jan. 14, P.L. (1951) 2035, § 1; 1963, July 25, P.L. 294, § 1.

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[2] 26 U.S.C.A. generally.

§ 5566b. Refund of taxes, etc., to which political subdivision is not legally entitled; interest

(a) Whenever any person or corporation of this Commonwealth has paid or caused to be paid, or hereafter pays or causes to be paid, into the treasury of any political subdivision, directly or indirectly, voluntarily or under protest, any taxes of any sort, license fees, penalties, fines or any other moneys to which the political subdivision is not legally entitled; then, in such cases, the proper authorities of the political subdivision, upon the filing with them of a written and verified claim for the refund of the payment, are hereby directed to make, out of budget appropriations of public funds, refund of such taxes, license fees, penalties, fines or other moneys to which the political subdivision is not legally entitled. Refunds of said moneys shall not be made, unless a written claim therefor is filed, with the political subdivision involved, within three years of payment thereof.

(b) The right to a refund afforded by this act may not be resorted to in any case in which the taxpayer involved had or has available under any other statute, ordinance or resolution, a specific remedy by way of review, appeal, refund or otherwise, for recovery of moneys paid as aforesaid, unless the claim for refund is for the recovery of moneys paid under a provision of a statute, ordinance or resolution subsequently held, by final judgment of a court of competent jurisdiction, to be unconstitutional, or under an interpretation of such provision subsequently held by such court, to be erroneous.

(c)(1) Any taxpayer who has paid any tax money to which the political subdivision is not legally entitled shall

receive interest on such sum of money. The political subdivision shall pay interest on such sums at the same rate and in the same manner as the Commonwealth is required to pay pursuant to section 806.1 of the act of April 9, 1929 (P.L. 343, No. 176), known as "The Fiscal Code."[1]

(2) For purposes of this subsection, the term "political subdivision" means a county, city, borough, incorporated town, township, home rule municipality, school district, vocational school district and county institution district.

1943, May 21, P.L. 349, § 1. As amended 1956, April 4, P.L. (1955) 1388, § 1; 1957, June 21, P.L. 381, § 2; 1986, Dec. 17, P.L. 1678, No. 193, § 1, effective July 1, 1987.

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[1] Section 806.1 of this title.

Supreme Court, U.S.
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In The

Supreme Court of the United States

WALTER H. ANNENBERG, as SOLE TRUSTEE of the TRUST UNDER WILL OF MOSES L. ANNENBERG, WALTER H. ANNENBERG and LEONORE ANNENBERG,

Petitioners,

v.

BOARD OF COMMISSIONERS OF THE COUNTY OF MONTGOMERY, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Pennsylvania

BRIEF FOR THE RESPONDENTS BOARD OF COMMISSIONERS OF THE COUNTY OF MONTGOMERY, ET AL. IN OPPOSITION

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23pp

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether the Supreme Court of Pennsylvania's remand to the County of Montgomery to remedy a discriminatory tax scheme is consistent with federal due process required by the Fourteenth Amendment.

2. Whether the Supreme Court of Pennsylvania correctly held that the United States Supreme Court's decision in *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, Fla. Dept. of Business Regulation*, 496 U.S. 18 (1990) provides a taxing authority with flexibility in curing a discriminatory tax scheme.

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OPINIONS

The Opinion and Judgment of the Supreme Court of Pennsylvania issued June 1, 2000, and the dissent thereto, (Pet. App. 1-App. 35) will be reported at 757 A.2d 338.

The Opinion and Order of the Supreme Court of Pennsylvania issued April 7, 1998 (Pet. App. 36-App. 48) are not reported in the Atlantic Reporter (Second). They are unofficially reported at *Annenberg, et al. v. The Commonwealth,* 2000 WL 704980.

JURISDICTION

The Opinions and Judgment of the Supreme Court of Pennsylvania (Pet. App. 1-App.35) were filed on June 1, 2000. The petition for writ of certiorari was filed on August 30, 2000. This Court has jurisdiction in its discretion to review a Judgment of the Supreme Court of Pennsylvania pursuant to 28 U.S.C. § 1257(a).

COUNTER-STATEMENT OF CASE

On March 27, 1996, on the heels of this Court's determination in *Fulton Corp. v. Faulkner,* 516 U.S. 325 (1996), Walter H. Annenberg, as the Sole Trustee for the Trust under the Will of Moses L. Annenberg, and Walter H. and

Leonore Annenberg (collectively, "Petitioners") filed petitions for review in the nature of a complaint for declaratory and injunctive relief in the Commonwealth Court of Pennsylvania against the Commonwealth of Pennsylvania and Thomas W. Corbett, Jr., Attorney General (collectively, the "Commonwealth") and also against the Board of Commissioners of the County of Montgomery and each Commissioner in his official capacity, the Board of Assessment Appeals of the County and the County itself (collectively, the "County"). Petitioners sought a declaration that 72 P.S. § 4821 (the County's "personal property tax" hereinafter) violates the Commerce Clause of the United States Constitution and is therefore null and void insofar as it imposes a tax on Petitioner's corporate stock.

By order dated December 23, 1996, the Commonwealth Court of Pennsylvania declined to exercise original jurisdiction and transferred the case to the Court of Common Pleas of Montgomery County sitting in equity "for the development of a complete factual record."

On January 3, 1997, Petitioners petitioned the Supreme Court of Pennsylvania to exercise plenary jurisdiction, 42 Pa. C.S. § 761. On January 31, 1997, the Supreme Court of Pennsylvania granted Petitioners' petition for plenary jurisdiction limited to the issue of whether 72 P.S. § 4821 is constitutional.

Petitioners challenged the constitutionality of the exemption of certain stock from taxation contained in what has been referred to as the "stock clause" of the personal property tax. The exemption can be highlighted as follows:

> [[t]he personal property tax shall be due on] all shares of stock in any bank, corporation, association, company or limited partnership, created or formed under the laws of this Commonwealth or of the United States, or of any other state or government, **except shares of stock in any** bank, bank and trust company national banking association, savings institution, **corporation,** or limited partnership liable to a tax on its shares or a gross premiums tax, or **liable to or relieved from the capital stock or franchise tax** for State purposes under the laws of this Commonwealth . . . 72 P.S. § 4821 [emphasis added].

Shares of stock in foreign corporations which do not do business in Pennsylvania, and therefore neither pay the capital stock nor the franchise tax, were subject to the personal property tax. On the other hand, shares of stock in corporations which do business in Pennsylvania, and therefore pay the capital stock or the franchise tax, were exempt from the personal property tax. It was this exemption, and only this exemption, which served as the basis of Petitioners' challenge.

By Order dated April 7, 1998, the Supreme Court of Pennsylvania found that the exemption in the stock clause facially discriminates against interstate commerce. However, the Court directed the Court of Common Pleas of Montgomery County to conduct a hearing on the following issues: "Whether 72 P.S. § 4821 is a 'compensatory tax' as defined by *Fulton Corp. v. Faulkner*, 516 U.S. 325 (1996). If it is determined that 72 P.S. § 4821 is not a 'compensatory tax,' and that 72 P.S. § 4821 is therefore unconstitutional as it violates the Commerce Clause of

the United States Constitution, what is the appropriate remedy."

By Order dated August 17, 1998, the Supreme Court of Pennsylvania clarified its April 7, 1998 Order and directed that the evidentiary hearing before the Court of Common Pleas be limited to the following issues: "(i) the evidence regarding the compensatory tax question; (ii) legal arguments on whether the personal property tax is a compensatory tax; and (iii) legal arguments as to whether it is the exemption that is unconstitutional, as opposed to the entire tax. The issue of what the appropriate remedies would be, in the event that 72 P.S. § 4821 is found to be unconstitutional, is not to be examined at these hearings." The August 17, 1998 Order further provided that: "At the conclusion of these hearings, we direct President Judge Smyth to prepare an interim report detailing his findings of fact and conclusions of law. . . . No action is to be taken on the issue of possible remedies until further instruction is issued by this Court."

President Judge Joseph A. Smyth accordingly conducted hearings in which Petitioners, the County, and the Intervenor Counties (collectively "the Counties") participated. After the close of hearings, President Judge Smyth filed an interim report with the Supreme Court of Pennsylvania on October 7, 1998. President Judge Smyth found that the exemption contained in the stock clause was not "compensatory", concluded that the exemption was unconstitutional, but reasoned that the statute need not be struck down in its entirety. Rather, President Judge Smyth opined that the language of the statute which excluded from taxation stock subject to the capital stock or franchise tax could be severed, leaving a personal

property tax which applied to all classes of stock whether they be held in out-of-state or in-state corporations. Finally, President Judge Smyth declared that the Counties could keep the tax which had been previously collected under the stock clause. In so concluding, President Judge Smyth stated that once the unconstitutional exemption was severed from the stock clause, leaving a tax which was applicable to stock held in either out-of-state or in-state entities, a valid tax remained. Consequently, President Judge Smyth reasoned the "Counties should be permitted to retain and collect the personal property tax on stock that is not subject to the capital stock or franchise tax."

On June 1, 2000, the Supreme Court of Pennsylvania affirmed President Judge Smyth's finding that the tax scheme impermissibly discriminated against interstate commerce, and that the exemption could be severed from the stock clause. The case was remanded to the Counties to fashion a remedy. Consistent with *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, Fla. Dept. of Business Regulation*, 496 U.S. 18 (1990), the Supreme Court of Pennsylvania found that the due process clause of the Fourteenth Amendment required that the Counties fashion a backwards-looking remedy whereby those taxpayers who had paid the tax were put in the same position as those taxpayers who had been favored by the unlawful exemption. The Court emphasized that the Counties' hands were not bound in choosing what type of backward looking remedy they could employ.

The Supreme Court of Pennsylvania rejected Petitioners' contention that the one, and only, remedy to cure the discrimination is a refund. The Supreme Court of Pennsylvania found that the refund statute, 72 P.S.

§ 5566b, was inapplicable to this case. The Court emphasized that it did not conclude that Counties are not legally entitled to levy a personal property tax on corporate stock holdings. Rather, it determined that in levying the personal property tax on corporate stock holdings, the Counties are not legally entitled to grant the exemption in 72 P.S. § 4821 to stock and corporations which have a taxable nexus with Pennsylvania because doing so discriminates against interstate commerce in violation of the Commerce Clause. The tax levied by Montgomery County on the Petitioners' corporate stock holdings constituted a tax to which the County was legally entitled. It was the exemption limited to Petitioners' stock in corporations which have a taxable nexus with Pennsylvania which constituted the illegal act by Montgomery County. Montgomery County had not levied a tax to which it was not legally entitled but instead granted an illegal exemption from a tax to which it was legally entitled. The Court found that the refund statute does not therefore limit the broad range of remedies permissible under the United States Constitution to the refund of taxes collected by the Counties. It is the Supreme Court of Pennsylvania's adherence to *McKesson* which Petitioners challenge in the present Petition for Certiorari. Therefore, Petitioners attempt to foreclose the County from fashioning an appropriate remedy consistent with *McKesson*.

ARGUMENT

Petitioners broadly assert that the Supreme Court of Pennsylvania's remand of their claims to the County of Montgomery to cure the impermissible tax scheme was

improper because the only permissible remedy under state law is a refund. Petitioners' argument ignores the clear principle of law first enunciated by this Court in *McKesson*, that a taxing authority has flexibility in curing an impermissibly discriminatory tax. Petitioner is asking this Court to simply abandon the flexibility it provided to taxing authorities in *McKesson* and which it has applied in numerous post-*McKesson* cases. The decision of the Supreme Court of Pennsylvania follows *McKesson, and* does not conflict with any decision of this Court. Therefore, further review is not warranted.

A. THE SUPREME COURT OF PENNSYLVANIA'S RULING THAT RESPONDENTS ARE RESPONSIBLE FOR PROVIDING PETITIONERS WITH A REMEDY CONSISTENT WITH *McKESSON* DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

Petitioners in their Petition for Writ of Certiorari assert that the payment of refunds is the only available remedy. According to Petitioners, this result is inevitable because the Supreme Court of Pennsylvania found that the portion of the stock clause which excludes from the personal property tax stock held in companies which are subject to the Pennsylvania Capital Stock and Franchise Tax operated in a manner that discriminated against interstate commerce. If the Petitioners are correct, then this Court must overturn the well-settled principle that a taxing authority must be given flexibility in curing an

impermissibly discriminatory tax, a principle which was first enunciated in *McKesson*.

In *McKesson*, the Florida Supreme Court held that Florida's Liquor Excise Tax unconstitutionally discriminated against interstate commerce because it provided preferences for distributors of certain local products. However, the Florida court declared that its ruling would be purely prospective, and denied the taxpayers any retrospective remedy.

This Court reversed the Florida Supreme Court and held that the Due Process Clause of the Fourteenth Amendment compelled Florida to fashion a backward-looking remedy whereby those who had paid the tax were put in the same position as those taxpayers who had been favored by the unlawful exemption. *McKesson*, 496 U.S. at 43. Significantly, this Court did not impose a remedy on Florida but, instead, enabled Florida the flexibility to cure the discrimination "through any form of relief, ranging from a refund of the excess taxes paid by Petitioner to an offsetting charge to previously favored distributors." *Id.* at 51.

In this case, the Supreme Court of Pennsylvania recognized that it was reviewing "a nearly identical situation" to *McKesson*. Pet. App. 23. Therefore, the Supreme Court of Pennsylvania followed *McKesson* by shifting the responsibility to the taxing authority to fashion a remedy to cure the discriminatory tax. Pet. App. 35.

Petitioners admit that *McKesson* stands for the "general proposition" that the taxing authority retains some "flexibility" in crafting the appropriate "meaningful

backward-looking" relief. Pet. 10. Despite their admission, however, Petitioners still argue that Respondents herein should be totally denied the opportunity of fashioning a remedy.

In *McKesson*, this Court indicated that there were special circumstances where refunds would be the only possible remedy. According to this Court, if the Liquor Excise Tax at issue in *McKesson* had been declared invalid "either because (other than its discriminatory nature) it was beyond the State's power to impose" or "because the taxpayers were absolutely immune from the tax," refunds would be the only way of curing the invalidity of the tax. *Id.* at 39. However, because the tax scheme in *McKesson* was not invalidated in its entirety by the Florida Court, but rather was held to be unconstitutional only insofar as it operated in a manner that discriminated against interstate commerce, this Court held that Florida retained flexibility in responding to this determination. *Id.* at 40-41. This case is nearly identical to *McKesson* in that the tax scheme was not invalidated in its entirety by the Supreme Court of Pennsylvania, but was found unconstitutional only insofar as it operated in a manner that discriminated against interstate commerce. Pet. App. 15-16. Thus, the taxing authority in Pennsylvania must, like the taxing authority in Florida, retain flexibility in responding to the discriminatory tax scheme.

Accordingly, Petitioners' argument that the taxing authority should not retain flexibility in fashioning a remedy falls outside the general proposition of *McKesson* and is therefore misplaced.

Petitioners also argue that even if Respondents are given the opportunity to fashion a remedy as required by *McKesson*, it will be impossible for Respondents to do so without violating constitutional limitations.[1]

Petitioners are putting the cart before the horse. They have filed a Petition which seeks to have this Court overturn *McKesson* and deny Respondents an opportunity to fashion a remedy. By their argument, Petitioners have attempted to bring the remedy process outlined in *McKesson* and followed by the Supreme Court of Pennsylvania to a grinding halt. They cannot at the same time challenge some hypothetical remedy which has not yet been proposed. They are premature at best. If the Respondents are subsequently allowed to proceed in accordance

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[1] For example, Petitioners allege that the taxing authority is precluded from retroactively imposing the personal property tax and cite *Commonwealth v. Budd Co.*, 108 A.2d 563 (Pa. 1954), *appeal dismissed*, 349 U.S. 935 (1955) in support thereof. In *Budd*, the Supreme Court of Pennsylvania held unconstitutional a 1947 corporate net income tax act which prohibited the deduction from 1944 net income of carry-back losses suffered in 1946 because it retroactively changed the law in calculating 1944 net income. Petitioners' argument is misplaced. First, the continued vitality of *Budd* is questionable. *Garofolo, et al. v. Commonwealth*, 648 A.2d 1329, 1332 (Pa. Cmwlth), *appeal dismissed*, 659 A.2d 561 (1994). See also *Fisher Controls Co., Inc. v. Commonwealth*, 381 A.2d 1253 (Pa. 1977). Moreover, as was the case in *Garofolo*, *Budd* is clearly distinguishable from the facts of this case because the 1947 corporate net income tax act changed the state tax base for the 1944 tax year in violation of *Welch v. Henry*, 305 U.S. 134 (1934). That is not the case here. Under Pennsylvania's personal property tax statute, all taxpayers are required to pay the exact same rate on all shares of stock and that rate is consistent for all years at issue in this case.

with *McKesson* and to fashion a remedy, the Petitioners will then have an opportunity (if they then desire) to challenge the remedy based on real, rather than hypothetical facts.

B. THE SUPREME COURT OF PENNSYLVANIA CORRECTLY HELD THAT *McKESSON* PROVIDES A TAXING AUTHORITY WITH FLEXIBILITY IN CURING A DISCRIMINATORY TAX SCHEME.

As discussed earlier, Petitioners admit that *McKesson* stands for the "general proposition" that the taxing authority retains some "flexibility" in crafting the appropriate "meaningful backward-looking" relief. Pet. 10

Nevertheless, Petitioners argue that the post-*McKesson* decisions in *Reich v. Collins*, 513 U.S. 106 (1994) and *Newsweek, Inc. v. Fla. Dept. of Revenue, et al.*, 522 U.S. 442 (1998),[2] abandon that very flexibility that this Court provided to taxing authorities in *McKesson*.[3]

An identical argument to the Petitioners was recently raised, and rejected, in a similar case from Washington

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[2] Both *Reich* and *Newsweek* are factually distinguishable from the instant case because in both of these cases, the taxpayers would have had no remedy if the respective state court decisions were affirmed. In this case, the Supreme Court of Pennsylvania has already recognized that, consistent with *McKesson*, the taxpayers are entitled to "meaningful backward-looking" relief.

[3] The Court expressly noted that its approach in *McKesson* regarding retrospective relief "is rooted firmly in precedent dating back to at least early [20th] century." *McKesson*, 496 U.S. at 32.

State. *W.R. Grace & Co. – Conn. v. State of Washington, Department of Revenue*, 973 P.2d 1011, *cert. denied*, ___ U.S. ___, 120 S. Ct. 371 (1999). In *W.R. Grace*, taxpayers brought an action alleging that the Washington Department of Revenue was unconstitutionally seeking to collect business and occupation taxes on interstate manufacturers and sellers. The Washington Supreme Court held, *inter alia*, that tax credits provided in a remedial taxing statute were an appropriate remedy where a taxing scheme was held to be unconstitutional. However, the taxpayers argued that the 1987 Credit Law, as an exclusive remedy, did not meet the requirements of federal due process. The Washington Supreme Court noted that at oral argument, taxpayers asserted that *Reich*, *Newsweek* and *Dryden v. Madison County*, 522 U.S. 1145 (1998), an opinion which vacated a Florida Supreme Court decision and remanded in light of *Newsweek*, were dispositive of the *Grace* case, suggesting the United States Supreme Court has retreated from the approach announced in *McKesson*. The Washington Supreme Court rejected this argument and stated that these cases, read together with *Associated Indus. v. Lohman*, 511 U.S. 641 (1994), and *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749 (1995), "do not indicate the Supreme Court has abandoned the 'flexibility' enunciated in *McKesson* . . . " *W.R. Grace*, 973 P.2d at 1020 n.12.

Likewise, the Supreme Court of Pennsylvania's decision acknowledges the continued vitality of *McKesson*, and its opinion is completely consistent with *McKesson* in recognizing that a refund is not the only possible remedy to cure a discriminatory tax.

As *McKesson* holds, a taxing authority that is found to have imposed an impermissibly discriminatory tax retains flexibility in responding to this determination and may cure the impermissible discrimination, *inter alia*, by: (1) refunding the difference between the tax the taxpayer paid and the tax that the taxpayer would have paid had the taxpayer been assessed in the same manner as others in taxpayer's class; (2) to the extent consistent with other constitutional restrictions, retroactively assessing other members of the taxpayer's class in the same manner that the taxpayer had been assessed; *or* (3) using a combination of a partial refund to the taxpayer and a partial retroactive assessment of a tax increase on other members of the taxpayer's class, so long as the resultant tax assessed during the contested tax period reflects a scheme that does not discriminate against interstate commerce. Each of these alone could satisfy the requirements of federal due process.

Therefore, it is clear that the taxing authority has the flexibility and sole responsibility under *McKesson* to fashion a remedy that is consistent with federal due process, making Petitioners' argument that a refund is the only possible remedy here simply premature. As this Court stated in *McKesson*:

> Because we do not know whether the state will choose in this case to assess and collect back taxes from previously favored distributors, we need not decide whether this choice would violate due process by unduly interfering with settled expectations. Should the state choose this remedial alternative, the state's effort to collect back taxes from previously favored distributors may not be perfectly successful. Some of these

> distributors, for example, may no longer be in business. But a good faith effort to administer and enforce such a retroactive assessment likely would constitute adequate relief, to the same extent that a tax scheme would not violate the commerce clause merely because tax collectors inadvertently missed a few in-state taxpayers. *McKesson*, 496 U.S. at 41 n.23.

Subsequent to *McKesson*, this Court has time and time again reinforced the flexibility that a taxing authority has in responding to an impermissible tax scheme. In *Associated Indus. v. Lohman*, 511 U.S. 641 (1994), this Court stated:

> That we have declared the tax scheme impermissibly discriminatory in some localities does not in itself dictate the relief that the State must provide. As we noted in [*McKesson*], a "state found to have imposed an impermissibly discriminatory tax retains flexibility in responding to this determination." . . . [T]he Due Process Clause would demand only that, "to cure the illegality of the tax as originally imposed, the State must ultimately collect the tax for the contested tax period that in no respect impermissibly discriminates against interstate commerce." *Id.*, at 44, n.27 . . . The methods best adapted to achieving equal treatment in this case, whether partial or complete refunds or other measures, are similarly matters properly left for determination on remand. *Lohman*, 511 U.S. at 656.

In *Harper v. Virginia Department of Taxation*, 509 U.S. 86 (1993), retired federal employees sought a refund of

certain Virginia state taxes, based on a retroactive application of this Court's decision in *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (1989). Although this Court agreed that *Davis* should apply retroactively to the tax years at issue in Petitioners' refund action, the Court refused to enter Judgment for the Petitioners "because federal law does not necessarily entitle them to a refund." *Harper*, 509 U.S. at 100. Thus, according to *Harper*, federal law does not necessarily mandate the refund of a tax found to be impermissibly discriminatory, and states retain flexibility to craft a remedy which satisfies federal due process. *Harper*, 509 U.S. at 100. "Under the Due Process Clause, U.S. Const., Amdt. 14, § 1, 'a State found to have imposed an impermissibly discriminatory tax retains flexibility in responding to this determination.' " *Id.* (citing to *McKesson*, 496 U.S. at 39-40). Therefore, this Court held that, "Virginia 'is free to choose which form of relief it will provide, so long as that relief satisfies the minimum federal requirements we have outlined'." *Harper*, 509 U.S. at 102 (citing *McKesson*, 496 U.S. at 51-52).

In *Fulton Corp. v. Faulkner*, 516 U.S. 325 (1996), the case relied upon by Petitioners, this Court found that North Carolina's intangibles tax facially discriminated against interstate commerce; however, this Court did not impose a remedy upon North Carolina. Citing favorably to *McKesson*, this Court held that North Carolina retained flexibility in responding to the impermissibly discriminatory tax. *Id.* at 346.

Petitioners, however, ignore the well-settled principle of federal law set forth in *McKesson* and argue that because Pennsylvania has a statute which provides for a tax refund in certain circumstances, 72 P.S. § 5566b, this

Court must abandon the flexibility that a taxing authority is provided in order to cure a discriminatory tax scheme. In other words, Petitioners are asking this Court to ignore the Constitution's Supremacy Clause, U.S. Const., art. VI, cl. 2, to rule that Pennsylvania's refund statute, which as discussed below is not even applicable under the facts of this case, trumps well-established federal law.

The Petitioners' argument regarding the refund statute is misplaced because they ignore the fact that the tax at issue in this case is itself not unconstitutional. As the Supreme Court of Pennsylvania noted, "[i]n its simplest terms, Section 5566b [only] provides a mechanism for the refund of taxes 'to which the political subdivision is not legally entitled.' " Pet. App. 29. As a majority of the Supreme Court of Pennsylvania observed, Montgomery County did not levy a tax to which it was not legally entitled, but instead, granted an illegal exemption from a tax to which it was legally entitled.[4] Thus, consistent with this ruling, and *McKesson*, the Supreme Court of Pennsylvania correctly noted that 72 P.S. § 5566b does not limit the broad range of permissible remedies to only a refund of taxes that were collected by the counties. In addition to the majority opinion, even Justice Cappy, in his Concurring and Dissenting Opinion, on which Petitioners expressly rely, points out that a refund such as that sought by Petitioners is not the only possible remedy:

---

[4] When the Court severed the exclusionary language in the stock clause which renders the stock clause unconstitutional, it left intact the County's ability to levy a personal property tax on corporate stock generally.

> I believe that the statutory requirement of providing a "refund" [original quotation] could be met in at least two fashions. One way would be to provide an immediate, lump sum payment of money. Another way of satisfying the dictates of 72 P.S. § 5566b would be to allow the counties to compensate the affected taxpayers by granting them a credit equal to the amount of taxes illegally collected pursuant to the discriminatory stock clause. This credit could be utilized to offset any taxes owed by that taxpayer to the county, whether those taxes be owed pursuant to the stock clause of the personal property tax or any other tax. Pet. App. 33 n.2.

Therefore, the flexibility provided to the taxing authorities by the Supreme Court of Pennsylvania is consistent with *McKesson* and the well-settled principles of federal law that Petitioners now ask this Court to overturn.

CONCLUSION

For all of the foregoing reasons, the petition for writ of certiorari submitted by Petitioners Walter H. Annenberg, individually and as Sole Trustee of the Trust Under Will of Moses L. Annenberg, and Leonore Annenberg should be denied.

Respectfully submitted,

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Dated: September 29, 2000

(3)

No. 00-343

Supreme Court, U.S.
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In The

Supreme Court of the United States

WALTER H. ANNENBERG, as SOLE TRUSTEE of the TRUST UNDER WILL of MOSES L. ANNENBERG, WALTER H. ANNENBERG and LENORE ANNENBERG,

Petitioners,

v.

BOARD OF COMMISSIONERS OF THE COUNTY OF MONTGOMERY, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Pennsylvania

RESPONDENT INTERVENORS' BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTION PRESENTED FOR REVIEW

Whether this Court should review the judgment of the Pennsylvania Supreme Court holding that an exemption to the Pennsylvania Personal Property Tax statute violated the negative Commerce Clause of the United States Constitution, severing the offending exemption, thus rendering the tax statute constitutional, and remanding the matter to the Counties of the Commonwealth of Pennsylvania with direction to provide a retrospective remedy for the past unconstitutional discrimination, prior to affording the Counties an opportunity to provide an appropriate remedy?

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COUNTER-STATEMENT OF JURISDICTION

The Petition for Writ of Certiorari was filed within thirty days of the Opinions and Judgment of the Supreme Court of Pennsylvania which were issued on June 1, 2000. Respondent Intervenors respectfully submit that this Court does not have jurisdiction to hear this matter at this time because the June 1, 2000 Opinions and Judgment of the Supreme Court of Pennsylvania is not final pursuant to 28 U.S.C. § 1257(a).

RELEVANT STATUTES

The relevant statutory provisions of the Commonwealth of Pennsylvania are 72 P.S. § 4821.1, 72 P.S. § 4844 and 72 P.S. § 4844.1. These provisions are reprinted in the Appendix.

REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI

Petitioners' request for review should be denied because the judgment of the Supreme Court of Pennsylvania is not "final" as is required for this Court to have jurisdiction under 28 U.S.C. § 1257(a). The judgment is not final because the Supreme Court of Pennsylvania remanded the case to the Counties[1] to craft a remedy

[1] The respondent intervenors in this matter are the County Commissioners' Association of Pennsylvania, and the Boards of the County Commissioners of Adams, Chester, Dauphin, Indiana, Lackawanna, Schuylkill, Warren and York Counties. In

which would provide Petitioners with meaningful backward-looking relief consistent with *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, Fla. Dept of Business Regulation*, 496 U.S. 18 (1990). Further, as this Court has stated, it is this Court's practice to allow the state supreme court to fashion a remedy in the first instance prior to taking up the issue of the appropriateness of that remedy for review. *Fulton v. Faulkner Corp.*, 516 U.S. 325 (1996).

Providing the necessary meaningful backward-looking relief demands a county by county examination of the new and greatly expanded base of taxable property reached by the Personal Property Tax, 72 P.S. § 4821 (Petition, App. at pp. 50-56) and, based upon that analysis and following the appropriate rule-making legislative actions by the Counties, the implementation of the chosen remedy. If no taxpayer challenges the remedy, there is no longer a case for this Court to review. Any taxpayer unhappy with his or her remedy may petition the Supreme Court of Pennsylvania so that Court can determine whether the Counties have leveled the playing field as that Court has ordered. Until that time, this matter is not ripe for review by this Court.

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this brief, the term "Counties" refers to all the counties in Pennsylvania which levied the PPT with its unconstitutional exemption.

I.

THIS COURT LACKS THE JURISDICTION TO GRANT THIS WRIT AS THE JUDGMENT RENDERED BY THE PENNSYLVANIA SUPREME COURT IS NOT FINAL.

Although this Court has jurisdiction to review, by writ of certiorari, the final judgment of the highest court of a state in which a decision could be had concerning the constitutionality of a state statute, pursuant to 28 U.S.C. § 1257(a), the judgment of the state court must be "final." In this case, the Supreme Court of Pennsylvania found that the exemption from taxation by the Pennsylvania Personal Property Tax (PPT) of the shares of stock of corporations subject to the Pennsylvania Capital Stock and Franchise Tax (*i.e.*, Pennsylvania corporations and corporations doing business in Pennsylvania) could not be justified as a compensatory tax and, therefore, was unconstitutional. The Pennsylvania Supreme Court severed the offending exemption, thereby making all shares of stock subject to the PPT, thus rendering the statute constitutional. The Supreme Court of Pennsylvania then remanded the matter to the various Pennsylvania Counties to provide an appropriate remedy. (Petition, App. at p. 31).

Prior to, and as an essential part of creating an appropriate remedy, the Counties must ascertain the scope of the new taxable base of the PPT. Through information which is currently available and readily obtainable, the Counties must determine the identity of each taxpayer who paid the PPT and how much each taxpayer paid under the formerly unconstitutional regime, whether that

taxpayer may now owe additional tax under the PPT and whether additional taxpayers, whose intangible property escaped taxation because they held stock only in Pennsylvania corporations or corporations doing business in Pennsylvania, may now be required to pay the PPT. Following this inquiry, each County must analyze the information gathered to determine which of the various alternative remedies, or which combination of such remedies, is most appropriate in that County, and after analysis, the County must implement that decision in the manner consistent with its rule-making authority.

Preliminarily, it should be noted that the Supreme Court of Pennsylvania, consistent with this Court's practice, did not limit its direction to the Counties to provide a particular remedy, but rather directed all the Counties which had implemented the PPT to provide an appropriate remedy. *See Fulton*, 516 at 347. ("Where 'the federal constitutional issues involved [in the remedial determination] may well be intertwined with, or their consideration obviated by issues of state law,' our practice is to leave the remedy for the state supreme court to fashion on remand.") (internal citations omitted.) The PPT was and is a tax authorized by state statute, but levied at the county level at the discretion of the individual County. 72 P.S. § 4821.1. (App. at p. 1). Thus, the constellation of remedies, including a refund, a credit, prospective or retroactive application of the PPT, or any combination thereof, must be determined on a *County by County* basis. Each County is in the process of fashioning the remedy appropriate to its particular situation. Following the implementation of the remedies, the Supreme Court of

Pennsylvania must determine any challenge to the adequacy of the remedies.

It should also not be overlooked that any remedy chosen by a County may provide the taxpayer with the required meaningful backward-looking relief and the present controversy may become moot. This applies with equal force to the remedy chosen by the Petitioners' home county, Montgomery County. Nevertheless, if any taxpayer, including Petitioners, feels aggrieved by the remedy chosen by a particular County, that taxpayer must apply to the Supreme Court of Pennsylvania for relief, prior to invoking this Court's jurisdiction. Only after that final step is taken, and the Supreme Court of Pennsylvania has passed upon that remedy, is this matter final. *See Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62 (1948) (state court judgment lacks finality where it compels action but offers various alternative ways to comply, some of which involve further administrative and judicial proceedings).

II.

THIS CASE IS NOT RIPE FOR REVIEW.

The Pennsylvania Supreme Court's decision announced on June 1, 2000 is not ripe for review by this Court. The Counties are still in the process of fashioning a remedy. The remedy provided by Petitioners' home county may satisfy Petitioners and moot the controversy. Any remedy crafted by a County that is challenged by taxpayers should, in the first instance, be reviewed by the Pennsylvania Supreme Court to determine whether the remedy provided is permitted by the Pennsylvania tax

regime, compatible with that Court's directives in *Annenberg v. The Commonwealth of Pennsylvania, et al.*, 2000 WL 704980, and permitted by the United States and Pennsylvania Constitutions. If a taxpayer who has brought such a challenge is dissatisfied with the ruling of the Pennsylvania Supreme Court, that taxpayer may then bring that dispute, which will be ripe for determination, to this Court for review.

Petitioners, in an effort to deny the Counties the opportunity to fashion a remedy, contend that the only meaningful backward-looking relief that the Counties can provide is a refund. Petitioners raise two separate meritless arguments for this proposition. First, Petitioners argue that the Counties do not have the authority, in a manner consistent with constitutional limitations, to retroactively impose the PPT on those taxpayers who had held stock which was previously exempt (*i.e.*, stock in Pennsylvania corporations or corporations which had done business in Pennsylvania). Second, Petitioners argue that the only possible meaningful backward-looking relief due Petitioners is a refund of taxes paid, which this Court should order. These contentions are both premature and incorrect.

The Supreme Court of Pennsylvania held that the PPT had been lawfully collected, but that the clause of the PPT which exempted from taxation stock in Pennsylvania corporations and corporations doing business in Pennsylvania was unlawful. The Supreme Court of Pennsylvania directed the Counties to level the playing field and provide those taxpayers who had paid the PPT under the unconstitutional tax regime with meaningful backward-looking relief. The Counties have begun the inquiry into

the method by which this must be accomplished. This necessary inquiry includes, *inter alia*, determining the scope of intangible property now taxable under the PPT, whether and who may now be liable for as yet uncollected taxes under the PPT, the determination of the chosen remedy, and the implementation of the remedy consistent with the authority granted to the Counties by Pennsylvania law. Until the Supreme Court of Pennsylvania has reviewed and passed upon the remedy, Petitioners' home county, Montgomery County, provides to Petitioners, their complaints are premature and do not present this Court with a concrete, justiciable controversy to adjudicate.

Petitioners' efforts to deny the Counties an opportunity to fashion an appropriate remedy focus this Court's attention on the Pennsylvania refund statute, but do not address the other mechanisms available under Pennsylvania law to provide Petitioners with the meaningful backward-looking relief they seek, *e.g.*, the right of the Counties to tax, for past years, the stock held by Pennsylvania residents which had previously escaped taxation under the now invalid exemption to the PPT.

Petitioners are wrong in their contention that any efforts by the Counties to retroactively assess the PPT would be inconsistent with Pennsylvania law. Under Pennsylvania law, the Counties may reassess the PPT return of a taxpayer which is "false, incomplete, incorrect or inaccurate," within five years after any of the property "held by a taxpayer should have been returned by him for taxation." 72 P.S. § 4844(a) and (c). (App. at pp. 1-3). The practical effect of the Supreme Court of Pennsylvania's decision below, which severed the exemption in the

PPT that had formerly saved from taxation stock held in corporations that paid the Capital Stock and Franchise Tax, is that all stock held by Pennsylvania citizens is now subject to the PPT. Thus, any resident who owned personal property which would have been subject to the PPT, but for the exemption, can be reassessed and required to pay a tax upon that property which was previously exempt. Therefore, under applicable Pennsylvania law, the Petitioners' home county, Montgomery County, may reassess Petitioners' PPT returns on the grounds that Petitioners' returns, as a result of the decision below, are now incorrect or inaccurate.[2]

Additionally, Petitioners' argument that the "transience of taxpayers make it impossible for the [Counties] to achieve substantial uniformity of taxation with respect to residents who would now be liable for personal property taxes" (Petition at p. 11) in effect places the rabbit in the hat. Whether the Counties are able to provide Petitioners with the "rough justice" they seek, by identifying and taxing those individuals who held stock which was

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[2] Petitioners claim refunds for the years 1993, 1994 and 1995. (Petition at p. 11). As stated *supra*, the Pennsylvania PPT was levied on all stocks, but exempted from taxation stocks in Pennsylvania corporations or corporations doing business in Pennsylvania. Should Montgomery County decide to retroactively assess the PPT, on previously exempt holdings, and assuming that two-thirds of Petitioners' holdings, previously exempt from taxation are now taxable, simply levying the PPT on Petitioners' holdings for the year 1996, alone, may lead to a tax liability equal to their refund claims for the years 1993, 1994 and 1995 and thus comply with the requirement that Petitioners be afforded meaningful backward-looking relief.

exempt from the PPT, is a matter which must be determined by the Counties in the first instance. The Counties' efforts at collecting any PPT taxes now need not be perfect. *McKesson*, 496 U.S. at 41 n.23 ("[A] good faith effort to administer and enforce . . . a retroactive assessment likely would constitute adequate relief, . . . "). In any event, the Counties should be given the opportunity to provide a remedy before Petitioners challenge the legitimacy of that remedy.

Pennsylvania law provides that the failure to challenge a PPT assessment within thirty (30) days of the assessment constitutes a waiver of the right to later challenge the assessment for that year. 72 P.S. § 4844.1(a). (App. at pp. 3-4). Upon receiving a PPT bill for the year 1996, Petitioners timely filed a challenge to the assessment as is required under Pennsylvania law. The tax assessment by Montgomery County for the year 1996 was held in abeyance pending the Supreme Court of Pennsylvania's decision in this matter. Neither Petitioners nor any other taxpayer timely challenged any assessment of the PPT prior to 1996. The impact that Petitioners' failure to timely challenge any PPT assessments prior to 1996 may have on the type of remedy provided by the Counties must be determined by the County's Board of Tax Assessment Appeals in the first instance. 72 P.S. § 4844.1. (App. at pp. 3-4). If the taxpayer feels aggrieved by that Board's decision, the taxpayer may then follow the appeal process and ultimately petition the Supreme Court of Pennsylvania for relief. If the taxpayer is not satisfied with the relief he or she has received after review by the appropriate state courts, including the Supreme Court of Pennsylvania, then, and only then, does the taxpayer

have a controversy which is ripe enough to allow a petition to this Court to review the relief granted.

The state law cases cited by Petitioners, *Schmuck v. Hartman*, 222 Pa. 190, 70 A. 1091 (1908) and *In re Davis*, 349 Pa. 651, 37 A.2d 498 (1944), that appear to preclude any remedy other than a refund, are inapposite, being based upon limitations in the taxing statute which have been long since eliminated by the Pennsylvania Legislature. Specifically, the PPT statute, as it existed at the time of the *Schmuck* decision, did not allow a County to retroactively reassess the PPT after the year in which it was due. In 1927, subsequent to the *Schmuck* decision, the Pennsylvania Legislature amended the PPT statute to allow the taxing authority to reassess a taxpayer's PPT return within five years after its filing. The PPT statute was again amended in 1945 to allow for the reassessment of PPT returns which were incorrect or inaccurate, which in effect overruled the *In re Davis* decision. In 1961, the Pennsylvania Legislature reorganized the PPT statute into separate sections, including 72 P.S. § 4844, (App. at pp. 1-3), which delineates the Counties' full authority to reassess PPT returns.

Similarly, Petitioners' citation to *Commonwealth v. Budd Co.*, 379 Pa. 159, 108 A.2d 563 (1954) for the proposition that the legislature cannot retroactively tax beyond the legislative session immediately preceding the enacted change in taxation (Petition at p. 10) is inapposite. The reassessment statute, 72 P.S. § 4844, is not new legislation, to which the *Budd* rule applies, but a pre-existing means for including in the tax base that property that should have been returned for taxation, but, for whatever reason, was not.

Finally, Petitioners' argument that the Pennsylvania Supreme Court's decision allowing the Counties to choose among the universe of potential remedies (including, *inter alia*, a refund, a credit, prospective or retroactive application of the PPT, or any combination thereof) rather than order the Counties to provide refunds under the guise of a "bait and switch," is without merit. Until a remedy is adopted, Petitioners cannot claim they are aggrieved by the choice of remedy. In the end, Petitioners may be satisfied with the remedy they are afforded. Thus, since the Counties have not yet had the opportunity to craft a remedy, Petitioners' complaint of a "switch" is premature as the "bait" has not yet been chosen.

In any event, before this Court intervenes in the matter, Pennsylvania should have the opportunity to determine whether any relief provided by the Counties is consistent with Pennsylvania law and the directions provided by the Supreme Court of Pennsylvania below.

CONCLUSION

For the reasons stated herein, respondent intervenors, the County Commissioners' Association of Pennsylvania, and the Boards of the County Commissioners of Adams, Chester, Dauphin, Indiana, Lackawanna, Schuylkill, Warren and York Counties, respectfully request this Honorable Court to deny Petitioners' Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX

§ 4821.1. Authority for imposition and collection of taxes

Notwithstanding any other provision of this law to the contrary, the county commissioners of each county of the second through the eighth class, and the city council in cities and counties of the first class, shall have the power to determine whether or not to impose and collect the taxes permitted under the provisions of this law.

1913, June 17, P.L. 507, No. 335, § 1.1, added 1978, April 18, P.L. 56, No. 26, § 1, imd. effective.

§ 4844. Failure to file return; false or late return; assessments; additions; time; objections

(a) If any taxable resident shall fail to file a return, or fail to include in any return all of his property made taxable by this act,[1] or shall file a return which is false, incomplete, incorrect or inaccurate, the board of revision of taxes, or the county commissioners, shall make an assessment of the tax against such resident of the amount of tax for which such resident is liable, or for which he is believed by the board of revision, or county commissioners, to be liable, to which estimated return the board of revision of taxes, or county commissioners, shall add twelve per cent, and the aggregate amount so obtained shall be the basis for taxation. If any taxable resident of a county of the second class or second class A shall file a return at a time later than the last day for filing such a return as fixed by law of the year in which he is liable to

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[1] 72 P.S. § 4844.

pay the tax imposed by this act, the board of property assessment appeals and review of such county of second class or the board of assessment appeals of such county of the second class A shall add five per cent to the assessment of the tax, and the aggregate amount so obtained shall be the basis for assessment.

(b) The board of revision, or the proper county commissioners, shall notify by mail such resident of the estimated assessment. If such resident is dissatisfied with the assessment so made, he may, on or before the day fixed for appeals from assessments, present reasons, supported by oath or affirmation, for his failure to file a return to include all of his taxable property therein; or for having made a return which was incomplete, incorrect or inaccurate, and the board of revision of taxes, or the county commissioners, as the case may be, may, if satisfied with the excuse so presented, permit the taxpayer to file his own return and substitute said return for the estimated return made by the board of revision of taxes or the county commissioners. In all cases where a false return has been filed by the taxpayer, the board of revision of taxes or the county commissioners, may not relieve the taxpayer from the payment of the twelve per cent penalty, but the estimated return shall be final, except in those cases in which a true and correct return shall reveal a higher assessed value than that contained in the estimated return, in which case the tax and penalty shall be based upon the true valuation.

(c) An assessment, as herein provided, may be made by the board of revision of taxes, or the county commissioners, at any time within five years after any property owned, held or possessed, or alleged to have

been so owned, held or possessed, by any resident should have been returned by him for taxation, notwithstanding he shall have paid a tax assessed on the basis of returns previously made or filed, and notwithstanding the board of revision of taxes, or the county commissioners, shall have made previous assessments against such resident. In any such case no credit shall be given for any penalty formerly assessed and paid.

1913, June 17, P.L. 507, § 5. Amended 1923, May 31, P.L. 474, No. 260, § 1; 1927, May 13, P.L. 985, No. 476, § 1; 1931, June 12, P.L. 544, § 1; 1945, May 18, P.L. 703, § 1; 1947, July 3, P.L. 1249, § 2; 1961, Sept. 2, P.L. 1230, § 1; 1990, May 4, P.L. 162, No. 37, § 1, imd. effective.

§ 4844.1. Reassessment, petition for; appeal

(a) Any resident, against whom an assessment is made, may petition the board of revision of taxes, or the county commissioners, for a reassessment. Notice of an intention to file such a petition, or to appear and be heard, shall be given to the board of revision of taxes, or the county commissioners, within thirty (30) days after notice of such assessment is given or sent by the board of revision of taxes, or the county commissioners, to the taxpayers, as provided in this act.[1] The board of revision of taxes, or the county commissioners, shall hold such hearings, as may be necessary, to hear and determine petitions for reassessment, at such places and at such times as may be determined by the rules and regulations

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[1] 72 P.S. § 4821 et seq.

of the board of revision of taxes, or the county commissioners, and each petitioner who has duly notified the board of revision, or the county commissioners, of an intention to file a petition for reassessment, or to appear and be heard, shall be notified by the board of revision of taxes, or the county commissioners, of the time when and the place where such hearings shall be held. All such petitions shall set forth specifically and in detail the ground, upon which it is claimed, the assessment is erroneous or unlawful, and shall be accompanied by an affidavit, under oath or affirmation, certifying to the correctness of the facts stated therein. If no petition for reassessment is filed with the board of revision of taxes, or the county commissioners, the petitioner may, in lieu thereof, appear at the hearing and present his petition orally, in which event all testimony or statements of facts shall be made under oath or affirmation.

(b) If such petitioner is dissatisfied with the action of the board of revision of taxes, or the county commissioners, on his petition for reassessment, he shall have the right to appeal to the court of common pleas of the county where he resides at any time within sixty (60) days after notice of such action is given to him by the board of revision of taxes, or the county commissioners. If any resident shall fail to give due notice of an intention to petition for reassessment, or to appear and be heard after due notice of his intention to do so, or to appeal to the court of common pleas within the time and in the manner herein set forth, the right to do so shall be forever barred, and any such resident, so failing, shall not thereafter be permitted in a suit for the recovery of such tax to set up any ground of defense which might have been

determined, either by the board of revision of taxes, or county commissioners, or the court of common pleas as aforesaid. In all cases of petitions for reassessment and appeals, the burden of proof shall be on the petitioner or appellant, as the case may be, and every appeal to the court of common pleas under this section shall specify all the objections to the assessment, and any objection not specified in the appeal shall not be considered by the court: Provided, That in counties of the second class where the amount of taxes for one year which may be levied on such assessment does not exceed the sum of twenty-five hundred dollars ($2500), such appeal shall be taken to the County Court of Allegheny County, and it shall be the duty of said court to hear and determine said appeal and, if necessary, to make such changes in the assessment as may be right and proper.

1913, June 17, P.L. 507, § 5.1, added 1947, July 3, P.L. 1249, § 3. Amended 1955, Dec. 13, P.L. 836, No. 243, § 1.

(4)

No. 00-343

Supreme Court, U.S.
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In The

Supreme Court of the United States

WALTER H. ANNENBERG, as SOLE TRUSTEE of the TRUST UNDER WILL of MOSES L. ANNENBERG, WALTER H. ANNENBERG and LEONORE ANNENBERG,

Petitioners,

v.

BOARD OF COMMISSIONERS OF THE COUNTY OF MONTGOMERY, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Pennsylvania

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I. THE DECISION BELOW IS FINAL FOR PURPOSES OF 28 U.S.C. § 1257 AND THE FEDERAL ISSUES ARE RIPE FOR REVIEW

The Respondents[1] assert that the instant petition is premature and/or not "ripe" because the local taxing authority has not yet announced backward-looking relief inconsistent with the Due Process Clause of the Fourteenth Amendment. In addition, the Respondent Intervenors contend that absent action by the local taxing authority, the June 1, 2000 judgment of the Supreme Court of Pennsylvania is not "final" for the purposes of review under 28 U.S.C. § 1257(a).

The notion that the Petitioners and this Court should await a decision by the local taxing authority which will clearly violate the Petitioners' due process rights is simply ludicrous especially where the Respondents' submissions make clear that they have no intention of "forthwith" remediating the admittedly "unconstitutional tax regime." (Brief of Respondent Intervenors, p. 6)

The Respondents' positions also ignore the facts in this case. Here, the Supreme Court of Pennsylvania entered a final judgment and relinquished jurisdiction over these cases. (App. 35) While further action by a non-

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[1] Briefs in Opposition were filed by the Respondents Board of Commissioners of the County of Montgomery, *et al.* ("Montgomery County Respondents") and Respondent Intervenors, the County Commissioners' Association of Pennsylvania, *et al.* ("Respondent Intervenors") (collectively referred to as "Respondents").

judicial body is required to effect the judgment of the Supreme Court of Pennsylvania, Petitioners are now "out of court" on their claims. This is especially true with respect to the Supreme Court of Pennsylvania's determination that Pennsylvania's refund statute, 72 P.S. § 5566b, does not apply in this matter.[2] Absent action by this Court, the Supreme Court of Pennsylvania's determination that an unconstitutional tax is one that is "legally collected" – a position which undermines this Court's decision in *Fulton Corp. v. Faulkner*, 516 U.S. 325 (1996) – will be controlling in all suits or appeals by taxpayers challenging the constitutionality of the personal property tax ("PPT") in the Commonwealth of Pennsylvania.[3]

Of course, even if further proceedings remained to be conducted in the state courts, the judgment would not necessarily be rendered non-final for purposes of review. In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 476-86 (1975), this Court described several categories of cases in which an ostensibly non-final decision of a state's highest court will nonetheless be reviewed.

As described by the Court in *Cox*, one such category arises where "the federal issue would not be mooted or otherwise affected by the proceedings yet to be had

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[2] As a result of that determination, at a minimum Petitioners have lost the statutory right to recover interest on the unconstitutionally collected taxes. 72 P.S. § 5566b(c)(1). (App. 57-App. 58)

[3] The Petitioners' suit was one of at least 16 suits challenging Montgomery County's collection of the PPT on constitutionality grounds.

because those proceedings have little substance, their outcome is certain, or they are wholly unrelated to the federal question." 420 U.S. at 478.

In this case, Petitioners' entitlement to meaningful backward-looking relief in the form of an immediate refund meets this *Cox* criterion.

In particular, if *certiorari* is not granted in this case, activities at the local taxing authority level will proceed on the basis of two incorrect federal question determinations: (1) that this Court's decision in *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, Fla. Dept. of Business Regulation*, 496 U.S. 18 (1990) requires that the local taxing authority be afforded the opportunity to select a remedy even though any option likely to be chosen will perpetuate the violation of Petitioners' due process rights; and (2) that a tax may be both facially discriminatory and not "compensatory" yet still be **"constitutional."**[4] *See Fulton*, 516 U.S. at 344.

Absent a ruling by this Court on the *McKesson* issue, as amplified by this Court in *Reich v. Collins*, 513 U.S. 106 (1994) and *Newsweek, Inc. v. Fla. Dept. of Revenue, et al.*, 522 U.S. 442 (1998), the county taxing authorities can

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[4] Notably, in its first substantive Order in this case, the Supreme Court of Pennsylvania acknowledged that the entire PPT had to be found unconstitutional if the PPT was not a "compensatory" tax. *See* App. 38: "If it is determined that 72 P.S. § 4821 is not a 'compensatory tax,' and that 72 P.S. § 4821 ***is therefore unconstitutional as it violates the Commerce Clause of the United States Constitution,***" the Court of Common Pleas for Montgomery County should determine what is the appropriate remedy. (Emphasis added)

freely and effectively delay remediation of Petitioners' unconstitutional treatment for years.[5] Indeed, the Respondent Intervenors claim that before it can even be determined whether or not retroactive application of the PPT is preferable, "county by county" examinations and analyses of the "new and greatly expanded base of taxable property" will have to be conducted.[6] (Brief of Respondent Intervenors, p. 2) According to the Respondent Intervenors, in the event a taxing authority selects retroactive application of the PPT the counties will then have to undertake for themselves "appropriate rule-making legislative actions" to implement this decision. *Id.* The Respondent Intervenors have threatened to introduce still more administrative impediments to relief for taxpayers by interposing an argument that certain "predeprivation" procedures were not followed.[7] Respondent Intervenors

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[5] Petitioners do not contend that this Court's decisions in *Newsweek* and *Reich* represent a "retreat" from the approach announced in *McKesson*. (Brief of Montgomery County Respondents, p. 12) Petitioners cite *Newsweek* and *Reich* for the proposition that where, as here, a state refund statute exists, that remedy may not be taken away from Petitioners "mid-course." Insofar as no such refund statute was at issue in *W.R. Grace & Co. – Conn. v. Washington, Dept. of Revenue*, 973 P.2d 1011 (Wash.), *cert. denied*, ___ U.S. ___, 120 S. Ct. 371 (1999), the analysis of the Washington Supreme Court in that case is inapposite.

[6] At the beginning of 1996, twenty-eight counties collected the PPT.

[7] Because taxpayers were placed under duress to promptly pay the PPT when due so as to avoid imposition of 6% interest, 72 P.S. § 4881, and a mandatory penalty of up to 10%, 72 P.S. § 5511.10, the "predeprivation" remedy cited by the Respondent Intervenors was inadequate to avoid a due process violation. *See*

invoke the procedure requiring a prompt challenge to any tax assessment provided in 72 P.S. § 4844.1 notwithstanding the Commonwealth Court of Pennsylvania's holding in this case that these procedures need not be followed because the Board of Assessment Appeals is without jurisdiction to determine the constitutional question presented here. *Annenberg, et al. v. The Commonwealth of Pennsylvania, et al.*, 686 A.2d 1380, 1383-84 (Pa. Cmwlth. 1996).

Of course, irrespective of the remedy ultimately afforded these Petitioners, absent review by this Court, the Supreme Court of Pennsylvania's view that the PPT is constitutional – although facially discriminatory and not "compensatory" – will stand. This view not only ignores this Court's *Fulton* opinion but forms the basis for the Supreme Court's inexplicable conclusion that monies collected pursuant to a constitutionally impermissible tax scheme were "legally" collected.[8] Because later review of this federal issue "cannot be had" this Court should

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McKesson, 496 U.S. at 31, 38. *See also Reich*, 513 U.S. at 111: "even assuming the constitutional adequacy of these [predeprivation] procedures . . . no reasonable taxpayer would have thought that they represented, in light of the apparent applicability of the refund statute, the *exclusive* remedy for unlawful taxes." (Emphasis in the original).

[8] Although 72 P.S. § 5566b provides that procedures such as those set forth in 72 P.S. § 4844.1 need not be followed by a taxpayer who presents a claim for refund "of moneys paid under a provision of a statute, ordinance or resolution subsequently held . . . unconstitutional," 72 P.S. § 5566b(b), the Pennsylvania Court's decision improperly deprives taxpayers of that benefit.

exercise jurisdiction over this federal issue now. *Cox*, 420 U.S. at 481.

If review is not granted the question of whether or not an impermissible "bait and switch" has been effected in this case will also go unresolved. Unless this issue is addressed by this Court, Petitioners will be forced to pursue a long and likely unsuccessful attempt to secure the refunds to which they are statutorily entitled under any sensible reading of Pennsylvania's refund statute, 72 P.S. § 5566b(b). *See* Dissenting Opinion, June 1, 2000: "a tax which was unconstitutionally collected is without question one to which the governmental entity was 'not legally entitled'." (App. 33) *See also Reich*, 513 U.S. at 111: the average taxpayer reading a State provision requiring refunds of "any and all taxes or fees which are determined to have been erroneously or illegally assessed and collected from [a taxpayer]" would "think it obvious that state taxes assessed in violation of federal law are 'illegally assessed'."

Even if Montgomery County eventually granted a full refund to Petitioners, the decision of the Supreme Court of Pennsylvania would establish bad precedent in the jurisprudence of the Commerce Clause, and should be reviewed – and vacated – now. Such a scenario would satisfy another prong of *Cox* providing that immediate review is appropriate where "the federal issue would be mooted if the petitioner or appellant seeking to bring the action here prevailed on the merits in the later state court proceedings, but there is nevertheless sufficient justification for immediate review of the federal question finally determined in the state courts." 420 U.S. at 478.

II. DUE PROCESS CANNOT BE SATISFIED THROUGH RETROACTIVE APPLICATION OF THE PPT

As set forth in the Petition for Writ of Certiorari, refund is the only remedy which will actually reflect a taxation scheme that does not discriminate against interstate commerce and, therefore, the only remedy of those set forth in *McKesson* which could comport with the Due Process Clause of the Fourteenth Amendment.[9] Specifically, here the taxing authority is precluded from retroactively imposing the personal property tax in order to impose equal burdens on "the former beneficiaries of the discrimination."

Neither Respondent disputes that in *Commonwealth v. Budd Co.*, 108 A.2d 563, 569 (Pa. 1954), *appeal dismissed*, 349 U.S. 935 (1955), the Supreme Court of Pennsylvania held that "a tax may not be retroactively applied beyond the year of the general legislative session immediately preceding that of its enactment; to provide otherwise constitutes a denial of due process." While the Montgomery County Respondents question the vitality of *Budd* in light of a subsequent decision of the lower Commonwealth Court of Pennsylvania in *Garofolo, et al. v. Commonwealth Dept. of Revenue*, 648 A.2d 1329 (Pa. Cmwlth.), *appeal dismissed*, 659 A.2d 561 (Pa. 1994), *Garofolo* reaffirms *Budd's* applicability where the subject matter of taxation has been altered and the taxing authority is

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[9] Accordingly, retroactive imposition of the PPT is hardly "some hypothetical remedy," not ripe for this Court's consideration. *See* Brief of Montgomery County Respondents, p. 10.

attempting to apply the modification retroactively over the larger tax base. 648 A.2d at 1333. Like the provision at issue in *Budd*, the Supreme Court of Pennsylvania's June 1, 2000 Judgment broadens the subject matter of taxation. Respondent Intervenors concede that as a result of this Judgment a "new and greatly expanded base of taxable property" will be reached by the PPT. (Brief of Respondent Intervenors, p. 2) Accordingly, any retroactive application of the PPT remains limited by the Supreme Court of Pennsylvania's holding in *Budd*.

The Respondent Intervenors try to avoid this result by arguing that a Pennsylvania statute, 72 P.S. § 4844, permits the reassessment of taxpayers within five years of when the tax return at issue was or should have been filed.[10] However, by its terms, § 4844 is limited to residents (1) who, although obligated to file a return, fail to file a return or (2) who file a return which either fails to include all property made taxable by the PPT, or which is otherwise "false, incomplete, incorrect or inaccurate." (Respondents Intervenors' App. 1) While the Respondent Intervenors would have this Court believe that the provisions of § 4844 are applicable to individuals heretofore excluded from paying the PPT, 72 P.S. § 4843.1, makes clear that a PPT return need only have been filed by "resident[s] liable to pay [the PPT]." *See also* 72 P.S. § 4841: "***each taxable*** person, . . . shall, respectively, make return annually of the aggregate amount of all the different classes of personal property made taxable by [the

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[10] Because this provision, first enacted in 1913, predates the Supreme Court of Pennsylvania's *Budd* decision, it is unclear how it could alter the vitality of that case.

PPT] . . . " Because individuals excluded from paying the PPT were not required to file a return, and because taxpayers who were required to file returns were only required to report property that was, at the time of filing, subject to tax, § 4844 does not provide a means by which heretofore excluded personal property may be "reached".[11]

Notably, the Montgomery County Respondents ignore the argument that retroactive application of the PPT is unauthorized by any statute, and thus barred. While the Respondent Intervenors argue that *In re Davis*, 37 A.2d 498 (Pa. 1944) and *Schmuck v. Hartman*, 70 A. 1091 (Pa. 1908) have been implicitly overruled by the enactment of statutes permitting reassessments of personal property tax in certain enumerated circumstances not presented here, both decisions remain viable for the proposition that, absent specific statutory authority, no retroactive assessment of personal property tax may be made after the year for which the tax would have been due. This principle of Pennsylvania law plainly precludes retroactive imposition of the PPT to property not previously taxable as an option to satisfy the requirements of *McKesson*.

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[11] The fact that persons not subject to the PPT were not required to file tax returns identifying their "excluded" personal property bolsters Petitioners' argument that retroactive application of the PPT consistent with due process will be practically impossible.

CONCLUSION

For all of the foregoing reasons, Petitioners Walter H. Annenberg, individually and as Sole Trustee of the Trust Under Will of Moses L. Annenberg, and Leonore Annenberg respectfully submit that their petition for writ of certiorari should be granted.

Respectfully submitted,

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